NO.	TITLE State of Oklahoma and State of Texas, Plaintiffs v. State of New Mexico

DOCKETED	COURT
April 16, 1987	Motion for leave to file Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
	Counsel for plaintiffs: R. Thomas Lay
	Counsel for defendant: Eric Richard Biggs
April 16, 1987	Motion for leave to file Bill of Complaint filed.
June 16, 1987	Order extending time to file a response to motion for leave to file bill of complaint granted until June 25, 1987.
June 25, 1987	New Mexico's brief in opposition to the Oklahoma and Texas motion for leave to tile bill of complaint filed.
June 30, 1987	DISTRIBUTED. Sept. 28, 1987.
Oct. 5, 1987	The motion for leave to file a bill of complaint is granted and defendant is allowed sixty days within which to file an answer.
Dec. 4, 1987	New Mexico's answer to bill complaint filed.
Dec. 9, 1987	DISTRIBUTED. Jan. 8, 1987. (Answer of New Mexico to bill of complaint).
Jan. 19, 1988	It is ordered that Jerome C. Muys, Esquire, of Washington DC, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate. The compensation of the Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Jan. 25, 1988	Oath of the Special Master received.
June 3, 1988	Request of Special Master for interim compensation filed.
June 3, 1988	DISTRIBUTED. 6/9/88. (Request of Special Master).
June 13, 1988	The motion of the Special Master for an order authorizing interim compensation and reimbursement of expenses is granted and the Special Master is awarded $16,771.79.

(OVER)

Title | No.

DATE	PROCEEDINGS AND ORDERS
Sept. 15, 1988	Letter from the Special Master respecting plaintiffs' motion for leave to file a supplemental complaint file
Oct. 3, 1988	DISTRIBUTED. Oct. 7, 1988. (Above letter from Special Master).
Nov. 18, 1988	Motion of plaintiffs for leave to file supplemental compla filed.
Nov. 22, 1988	DISTRIBUTED. Dec. 9, 1988. (Above motion).
Nov. 30, 1988	Response by New Mexico filed. (D).
Dec. 12, 1988	The motion of plaintiffs for leave to file a supplement complaint is granted. Brennan, J., OUT.
Jan. 7, 1989	Motion of New Mexico for leave to file a supplemental answer filed.
Jan. 11, 1989	DISTRIBUTED. Feb. 17, 1989. (Above motion).
Jan. 19, 1989	← Opposition to Motion of New Mexico for leave to file a supplemental answer filed by Plaintiffs.
Jan. 21, 1989	Motion of Special Master for compensation and reimburse ment of expenses filed.
Jan. 25, 1989	DISTRIBUTED. Feb. 17, 1989. (Motion of Special Master for compensation and reimbursement of expenses).
Jan. 26, 1989	New Mexico's Reply to motion for leave to file supplemental answer filed.
Feb. 21, 1989	The motion of New Mexico for leave to file a supplemental answer is granted. The motion of the Special Maste for award of fees and expenses is granted the Special Master is awarded $22,744.99, to be paid equally by the parties.
Oct. 5, 1989	Interim report by the Special Master filed. (NP)
Oct. 5, 1989	Motion of Special Master for payment of compensation an reimbursement for expenses for the period December 1, 1988 through August 31, 1989 filed.
Oct. 11, 1989	DISTRIBUTED. Oct. 27, 1989.
Oct. 30, 1989	The interim report of the Special Master is received and ordered filed. The motion of the Special Master for allowance of compensation and reimbursement of ex- penses is granted and the Special Master is awarded $22,200.83 - one third to be paid by each party.
Apr. 23, 1990	Motion of the Special Master for approval of fees for the period Sept. 1, 1990 through Jan. 31, 1990 filed.
May 15, 1990	DISTRIBUTED. May 31, 1990. (Motion of Special Master for approval of fees).
June 4, 1990	The motion of the Special Master for allowance of compensation an reimbursement of expenses is granted and the Special Master is awarded $61,292.54 for the period Sept. 1, 1989 through Jan. 31, 1990 -- one-third to be paid by each party.
Oct. 16, 1990	Report of the Special Master received.

No. 109 Original | TITLE State of Oklahoma and State of Texas, Plaintiffs v. State of New Mexico

DOCKETED	COURT
April 16, 1987.	Motion for leave to file Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
Oct. 17, 1990	DISTRIBUTED. Nov.2, 1990. (Report of Special Master)
Oct. 12, 1990	Response by Colorado to the Report of the Special Ma filed.
Oct. 17, 1990	Response by the U. S. to the Report of the Special Master filed.
Nov. 5, 1990	The Report of the Special Master is received and or filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be fil within 30 days.
Dec. 4, 1990	Motion of the Special Master for compensation and reimbursement of expenses filed.
Dec. 5, 1990	DISTRIBUTED. Jan. 4, 1991.
Dec. 20, 1990	Exceptions of Texas to the Report of the Special Maste
Dec. 20, 1990	Exceptions of New Mexico to the Report of the Specia Master filed.
Dec. 20, 1990	Exceptions of Oklahoma to the Report of the Special Ma filed.
Jan. 7, 1991	The motion of the Special Master for compensation a reimbursement of expenses is granted and the Specia Master is awarded a total of $71,790.81 for the per February 1, 1990 through November 8, 1990 - on thir be paid by each party.
Jan. 22, 1991	New Mexico's reply to Texas' and Oklahoma's excepetic to Report of Special Master filed.
Jan. 22, 1991	Reply of Oklahoma to New Mexico's exceptionss to the Special Master's Report and Brief in Support file
Jan. 23, 1991	DISTRIBUTED. Feb. 15, 1991.
Jan. 22, 1991	Reply of the State of Texas filed.
Feb. 19, 1991	The Exceptions to the Report of the Special Maste for oral argument in due course.
Feb. 25, 1991	The motion of Oklahoma for divided argument on behalf of plaintiffs is granted. The motion of N. Mexico that oral argument be set for the March Calendar rather than the April Calendar is denite
Feb. 27, 1991	Set for oral argument Tuesday, April 16, 1991. (3rd c
March 22, 1991	CIRCULATED.
April 16, 1991	Argued.
June 17, 1991	Exceptions sustained in part and orverruled in part, case remanded. White, J. delivered the opinion c Court, in which Marshall, Blackmun, Stevens, and

Title | No.

DATE	PROCEEDINGS AND ORDERS
	Souter, JJ., joined, and in Parts I, II, and IV of which Rehnquist, C.J. and O'Connor, Scalia, and Kennedy, JJ., joined. Rehnquist, C.J., filed an opinion concurring in part and dissenting in part, in which O'Connor, Scalia, and Kennedy, JJ., joined.
15, 1991	Motion of Special Master for compensation and reimbursement of expenses filed
	DISTRIBUTED. Jan. 10, 1992.
13, 1992	Motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $14,499.45 for the period December 1, 1990 through October 31, 1991, to be paid one-third by each party.
12, 1991	New Mexico's petition for rehearing filed.
2, 1991	DISTRIBUTED (Summer Rehearing List 2)
t. 13, 1991	Rehearing denied.
(Board)	
28, 1993	Report of Special Master filed.
28, 1993	Joint motion for entry of stipulated judgement and decree filed.
2, 1993	DISTRIBUTED. (Above Report and Motion) June 18, 1993.
21, 1993	REDISTRIBUTED. June 25, 1993 (Above report and motion)
28, 1993	ORDER: The Solicitor General is invited to file a brief in this case expressing the views of the United States on the Joint Motion for Entry of Stipulated Judgment and Decree.

MOTION FILED
APR 16 1987

No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF OKLAHOMA AND
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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April 16, 1987

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COMPLAINT 1

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT 23

No. _____, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF OKLAHOMA AND
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Comes now the State of Oklahoma, by its Attorney General, The Honorable Robert H. Henry, and The State of Texas, by its Attorney General, The Honorable Jim Mattox, and hereby move the court for leave to file their Complaint against the State of New Mexico.

Respectfully submitted,

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Attorney General of Oklahoma

SARA J. DRAKE
Assistant Attorney General
Chief, Public Protection Division

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No. _____, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF OKLAHOMA AND
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

COMPLAINT

The State of Oklahoma, by its Attorney General, the Honorable Robert H. Henry, and the State of Texas, by its Attorney General, the Honorable Jim Mattox, bring this suit against the defendant, State of New Mexico, seeking a decree commanding the State of New Mexico to comply with its duties and obligations under the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74, and, for their cause of action, state:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and Paragraph (a)(1), Section 1251, Title 28 of the United States Code.

2. The Canadian River is an interstate river which rises in northeastern New Mexico, near Raton. From its headwaters, the Canadian River flows south, then generally from the west to the east through New Mexico, Texas and Oklahoma. In Oklahoma, the Canadian River flows into the Arkansas River, a tributary of the Mississippi River.

3. By Act of April 29, 1950, Congress consented to the negotiation of a compact between New Mexico, Texas and Oklahoma for an equitable apportionment of the waters of the

Canadian River. 64 Stat. 93. On December 6, 1950, the Canadian River Compact ("Compact") was finalized and agreed to by the three states acting by and through their respective Compact commissioners. The Compact was thereafter ratified, approved and adopted as state law, by New Mexico by its Act of February 7, 1951, N.M. Comp. Stat. 1953, §75-34-3 (currently §§72-15-2 et seq.); Texas by its Act of May 10, 1951, ch. 153, 1951 Tex. Gen. Laws 260 (currently Texas Water Code Ann., §§43.001 et seq., Vernon 1972); and Oklahoma by its Act of March 22, 1951, 82 O.S. 1951, §§526.1 et seq. (currently 82 O.S. 1981, §§526.1 et seq.). By Act of May 17, 1952, the Canadian River Compact was consented to and enacted into federal law by Congress. 66 Stat. 74. A true, correct and complete copy of the Canadian River Compact is attached hereto as Appendix A and made a part hereof by reference.

4. The principal purposes of the Canadian River Compact were, and are, to equitably apportion the waters of the Canadian River among New Mexico, Texas and Oklahoma; promote interstate comity; remove causes of present and future interstate controversy; make secure and protect present developments within the compacting states; and provide for the construction of additional works for the use and conservation of the waters of the Canadian River. 64 Stat. 93, 66 Stat. 75.

5. The Canadian River Commission ("Commission") is the interstate agency charged with the duty and responsibility of administering the Compact. The Commission is composed of one commissioner from each signatory state and a federal commissioner who presides over Commission meetings but does not vote. The Compact requires a unanimous vote by the state commissioners for the taking of all actions by the Commission. Article IX, Canadian River Compact; 66 Stat. 76, 77.

6. To achieve its purpose of equitably apportioning the waters of the Canadian River, the Compact imposes specific numerical limitations regarding the waters of the Canadian

River flowing through New Mexico and Texas. The Compact limits the amount of "conservation storage" which may be available in New Mexico and the amount of water which may be impounded and retained in "conservation storage" in Texas. Articles IV, V and VI, Canadian River Compact; 66 Stat. 75, 76. The compact defines "conservation storage" as ". . . that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them." Paragraph (d), Article II, Canadian River Compact; 66 Stat. 75.

7. The Canadian River Compact thus equitably apportions the waters of the Canadian River by imposing a limitation on reservoir capacity for conservation storage in New Mexico and a limitation on the quantity of water in conservation storage in Texas, and by disallowing amounts in excess of those limitations. In this way, the Compact assures to the downstream states, namely Texas and Oklahoma, continuous and dependable quantities of Canadian River flow which exceed quantities allowed to be impounded, retained in storage, and beneficially used by and in the state or states upstream.

8. Over the years, the waters of the Canadian River have undergone substantial conservation storage development in New Mexico, Texas and Oklahoma. Reservoir storage capacity, in excess of four million (4,000,000) acre-feet, has been established on the waters of the Canadian River in the three states through the construction of at least one hundred twenty-three (123) reservoirs, forty-five (45) of which are located in New Mexico, twenty-five (25) in Texas and fifty-three (53) in Oklahoma. As a result of these and planned future developments, and in reliance on the apportionments made under the Compact, New Mexico, Texas and Oklahoma, and their citizens, place substantial dependence on the waters,

and continued flow, of the Canadian River for municipal, industrial, domestic, recreation and fish and wildlife maintenance uses in their respective states.

9. Under Paragraph (b) of Article IV of the Compact, New Mexico is allowed free and unrestricted use of all waters originating in the drainage basin of the Canadian River in New Mexico below Conchas Dam, subject to the limitation that the amount of conservation storage in New Mexico, or reservoir storage capacity available for impounding those waters, cannot exceed an aggregate total capacity of two hundred thousand (200,000) acre-feet.

10. During 1963–1964, New Mexico constructed Ute Dam and Reservoir on the Canadian River below Conchas Dam near the town of Logan, New Mexico. Ute Reservoir is owned, operated and controlled by the defendant State of New Mexico, acting by and through a designated state agency, the New Mexico Interstate Stream Commission. As originally constructed, Ute Reservoir had the capacity to impound and store a total of approximately 109,600 acre-feet of Canadian River water. In 1982, New Mexico commenced actual construction to enlarge Ute Reservoir and, in 1984, that construction was completed. As enlarged, Ute Reservoir has the capacity to impound and retain in storage a total of approximately 272,800 acre-feet of Canadian River basin water below Conchas Dam. Of this 272,800 acre-feet of total impoundment and reservoir storage capacity, approximately 235,718 acre-feet is available to, and usable by, New Mexico as "conservation storage." The remaining 37,082 acre-feet of capacity is either unreleasable dead storage or filled with sediment.

11. In addition to Ute Dam and Reservoir, there are located on the Canadian River below Conchas Dam in New Mexico the following dams and reservoirs, having the respective conservation storage capacities indicated:

DAM AND RESERVOIR	CONSERVATION STORAGE
Clayton Reservoir	4,082 acre-feet
Hittson Creek Reservoir	123 acre-feet
Aragon Reservoir	281 acre-feet
Smithson Reservoirs (3)	357 acre-feet
Juaquilla Reservoir	180 acre-feet
Gardner Reservoir	239 acre-feet
Poling Reservoir	178 acre-feet
Snyder Reservoir	223 acre-feet
Weatherly Reservoir	1,082 acre feet
Total (Excluding Ute Reservoir)	6,745 acre-feet

12. With the enlargement of Ute Reservoir, thereby creating a reservoir having a conservation storage capacity of 235,718 acre-feet, and by reason of the 6,745 acre-feet of conservation storage available from the nine (9) additional reservoirs identified and listed in paragraph eleven above, there currently exists, and continues to exist, at least 242,463 acre-feet of conservation storage in New Mexico available for impounding waters of the Canadian River which originate in the drainage basin of the Canadian River below Conchas Dam. This amount exceeds New Mexico's conservation storage apportionment, limitation and entitlement, under Paragraph (b), Article IV, of the Compact, by at least 42,463 acre-feet. New Mexico has, therefore, knowingly and willfully violated, and continues to violate, its express obligations under, and the terms and provisions of, the Canadian River Compact.

13. New Mexico's Compact violation has caused, and, if not remedied, shall continue to cause, direct, immediate, grave and irreparable injury and harm to the plaintiff State of Texas and its citizens by preventing Texas from receiving the amount of water that it is entitled to receive under the Compact. Most of the Canadian River flows which Texas receives from New Mexico are captured in Lake Meredith, which is located on the Canadian River north of Amarillo, Texas. The

waters of Lake Meredith are allocated and distributed to the cities of Amarillo, Lubbock, Plainview, and eight other cities and towns in the Texas High Plains. Because of prolonged drought, Lake Meredith has never filled, and for many years has operated well below capacity. Therefore, although the yield of Lake Meredith has been totally allocated to the eleven cities and towns supplied by the reservoir, the reservoir is not now able to supply the cities with their full allocations. New Mexico's Compact violation has further, and substantially, impaired the yield of Lake Meredith and its ability to supply the drinking water and other municipal and industrial water requirements of these cities and towns and their inhabitants. The ability of the State of Texas to use the Canadian River flows as a dependable source of water for its inhabitants has thus been impaired and its reasons for joining in the Compact have been nullified.

14. The New Mexico Compact violation has resulted in, and, if not remedied, shall continue to result in, grave and irreparable injury and harm to the plaintiff State of Oklahoma and its citizens. Just as Texas relies and depends on receiving its Compact share of Canadian River flows from New Mexico, and just as Texas has suffered, and shall continue to suffer, harm, injury and deprivation in entitlement from declining Canadian River flows from New Mexico, Oklahoma has suffered, and shall continue to suffer, harm, injury and deprivation in entitlement as a result of declining Canadian River flows from New Mexico into Texas, and consequentially, from Texas into Oklahoma. Since the construction and enlargement of Ute Reservoir, and the construction of Lake Meredith, Canadian River flows into Oklahoma have declined from approximately 591 cubic-feet per second to a post-construction average annual amount of approximately 84 cubic-feet per second. Oklahoma states further that it has identified sites on the Canadian River which are feasible and needed for future reservoir and conservation storage development in Oklahoma, and that these developments are dependent on Oklahoma receiving its Compact share of Canadian River flows from Texas. New Mexico's Compact interpretation, and Compact violation thereunder, impairs Oklahoma's ability to proceed with these planned and needed developments, by making Oklahoma's realization of Compact apportioned Canadian River waters totally undependable for conservation storage development purposes.

15. Texas and Oklahoma have not consented to, nor have they otherwise allowed or permitted, New Mexico to exceed its conservation storage apportionment and limitations imposed under Paragraph (b) of Article IV of the Canadian River Compact. Further, since as early as July, 1982, Texas and Oklahoma, acting officially by and through their respective commissioners to the Canadian River Commission, have repeatedly expressed their respective positions, concerns and objections to New Mexico in reference to its actions and Compact violation of developing and maintaining conservation storage in excess of amounts allowed under the Compact. At numerous official meetings of the Commission, and in various manners, Oklahoma and Texas have expressed their objections to New Mexico. New Mexico has, nevertheless, consistently refused, and continues to refuse, to acknowledge or cease its violation, and to comply with its duties and obligations under the Compact.

16. In defense of its actions and conduct, New Mexico has espoused various Compact theories, interpretations and constructions which, in New Mexico's view, excuse its violation. New Mexico has asserted that although it possesses conservation storage capacity in excess of amounts allowed under the Compact, much of that capacity is not "conservation storage" under the Compact definition of that phrase. New Mexico contends that much of its storage and storage capacity is for the impoundment and retention of water for recreation and for fish and wildlife purposes, and this water, by New Mexico intrastate agency contract, is not available to New Mexico for "release" for domestic, municipal, irrigation and industrial uses and purposes. New Mexico asserts, therefore, that its

reservoir storage capacities for recreation, and fish and wildlife purposes, or for any other purpose except domestic, municipal, irrigation and industrial purposes, do not constitute "conservation storage" under the Compact, but are entirely beyond the ambit of the Compact and not subject to equitable apportionment under the Compact. New Mexico accordingly states that it can construct and maintain as much impoundment and reservoir storage capacity, regarding the waters of the Canadian River in New Mexico, as it wishes under such circumstances and conditions.

17. If New Mexico's violation, and the Compact interpretations and constructions upon which it seeks to excuse the violation, are allowed to exist and continue without relief from this Court, the only Court to which these plaintiffs have resort, the Compact shall be rendered totally meaningless because of New Mexico's resultant ability to impound and retain in storage unlimited quantities of Canadian River water below Conchas Dam. As to that threat and resultant harm to Texas and Oklahoma, New Mexico has stated, officially and of record, its plan and intention to further develop the waters of the Canadian River in New Mexico below Conchas Dam pursuant to its erroneous interpretation and construction of the Compact. On or about February 14, 1986, the New Mexico Interstate Stream Commission filed its "Notice of Intention To Make Formal Application For Permit" with the New Mexico State Engineer, the New Mexico public official authorized by state law to allow and approve such permits and appropriations. The notice expresses the intention of the New Mexico Interstate Stream Commission to make application for a permit to appropriate *all* unappropriated waters of the Canadian River and its tributaries between Ute Dam and the New Mexico–Texas state line, the waters to be appropriated by both direct diversion and *storage*. Pursuant to the notice, the water would be appropriated, stored and used for, among other things, recreation, and fish and wildlife purposes by the New Mexico Interstate Stream Commission.

18. Texas and Oklahoma have heretofore vigorously pursued and exhausted all possible remedies, other than litigation, available to correct New Mexico's existing and continuing Compact violation and to obtain New Mexico's compliance with the Compact. Texas and Oklahoma have no alternative legal remedy available to them for purposes of correcting New Mexico's violation and obtaining its compliance with the Compact, nor do they have any alternative remedy available for protecting their rights and interests under the Canadian River Compact, other than through the exercise of this Court's exclusive and original jurisdiction in this case and controversy. Absent the acceptance and exercise of original jurisdiction by this Court, Texas and Oklahoma and their citizens shall continue to have their rights under the Canadian River Compact violated by New Mexico, and shall continue to sustain the grave and irreparable harm and injury they are presently sustaining as a result of New Mexico's wrongful acts and conduct.

WHEREFORE, Texas and Oklahoma respectfully pray that this Honorable Court assume and exercise its original and exclusive jurisdiction in this case, and that the court enter Orders, Decrees and Opinions enjoining the Canadian River Compact violation by New Mexico, described above, and commanding the State of New Mexico, acting by and through its appropriate state agencies and officers, to take such remedial steps and actions as may be necessary and required to bring it into compliance with the terms and provisions of the Compact. Texas and Oklahoma additionally pray that this Honorable Court grant and provide such other and further relief as the court may find and deem necessary and appropriate.

Respectfully submitted,

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Attorney General of Oklahoma

SARA J. DRAKE
Assistant Attorney General
Chief, Public Protection Division

MICHAEL SCOTT FERN
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Deputy Chief, Civil Division

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Attorneys for Texas

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexcio and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and

industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food

and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the

three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualifed independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper admin-

istration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States. The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the United States of America

No. _____, Original

IN THE

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STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

By this action, the States of Oklahoma and Texas seek a decree commanding the State of New Mexico to comply with its duties and obligations under the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74.

The Canadian River Compact is an interstate agreement and federal law which equitably apportions the waters of the Canadian River among Oklahoma, Texas and New Mexico. The Compact apportions those waters by imposing a limitation on the amount of conservation storage New Mexico may maintain for impounding and retaining Canadian River waters, and a limitation on the amount of Canadian River waters Texas may impound and retain in conservation storage. New Mexico has violated its obligations under the Compact by constructing and maintaining conservation storage for the waters of the Canadian River in New Mexico in excess of the amount allowed under the Compact. New Mexico's violation has deprived Oklahoma and Texas of their respective entitle-

ments to Canadian River waters apportioned under the Compact, and has caused, and will continue to cause if not remedied by the Court, substantial and irreparable injury to Oklahoma and Texas.

STATEMENT OF FACTS

The Canadian River, a major tributary of the Arkansas River, has long been viewed by New Mexico, Texas and Oklahoma as an extremely valuable and important natural resource, capable of satisfying much of the water supply needs of citizens and industries in the arid plains of northeastern New Mexico, the Texas High Plains and west central Oklahoma. To achieve this capability, New Mexico, Texas and Oklahoma recognized that the development and conservation of Canadian River waters, in each of the three states, would be necessary, and that an interstate agreement apportioning those waters among the three states would be required before that development and conservation could occur.

A compact apportioning the waters of the Canadian River among New Mexico, Texas and Oklahoma was first attempted in 1926. Although a compact draft was negotiated, the draft was never ratified by all three states, and the compact attempt failed. Efforts to arrive at a compact were renewed in mid-1949, due largely to the fact that a compact became a Congressionally imposed prerequisite to construction of the then proposed Sanford Project (now Lake Meredith) on the Canadian River in the Texas Panhandle. Act of December 29, 1950, 64 Stat. 1124; United States Department of the Interior, Bureau of Reclamation, "Plan for Development, Canadian River Project, Texas," Project Planning Report No. 5-12.22-1 (June, 1949).

By its Act of April 29, 1950, Congress adopted Public Law 81-491 (64 Stat. 93) authorizing New Mexico, Texas and Oklahoma to enter into negotiations for a compact equitably apportioning the waters of the Canadian River. Compact negotiations were conducted by authorized representatives from each state between June 30 and December 6, 1950. On

December 6, 1950, a final draft of a compact was agreed to and signed by the New Mexico, Texas and Oklahoma representatives. Thereafter, the Compact was adopted and ratified by each signatory state, consented to by Congress and signed by the President. Act of May 17, 1952, 66 Stat. 74.

The Compact created an interstate agency, known as the "Canadian River Commission," to administer and enforce the Compact. Compact, Article IX (a). The Commission consists of four (4) members (commissioners), one commissioner from each of the three signatory states and one non-voting federal commissioner who serves as presiding officer. Under the Compact, a unanimous vote of the commissioners for the three signatory states is required for the taking of any actions by the Commission.

As stated in the Compact and its authorizing federal legislation, the major purposes of the Compact are to equitably apportion the waters of the Canadian River among New Mexico, Texas and Oklahoma; promote interstate comity; remove causes of present and future controversy; make secure and protect present developments within the states; and provide for the construction of additional works for the conservation of the Canadian River. 64 Stat. 93; 66 Stat. 75.

The Compact equitably apportions the waters of the Canadian River, protects present developments and provides for future developments, by imposing limitations on the amount of Canadian River conservation storage in New Mexico and the amount of Canadian River waters in conservation storage in Texas. The Compact defines "conservation storage" to mean:

> ". . . that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production, and sediment control, or any of them." (Canadian River Compact, Article II (d))

Under Article IV of the Compact, New Mexico is allowed free and unrestricted use of all waters originating in the drain-

age basin of the Canadian River in New Mexico below Conchas Dam, subject to the limitation that the amount of conservation storage in New Mexico available for impounding those waters, is limited to an aggregate of 200,000 acre-feet. The Compact thereby ensures that all Canadian River flows which exceed amounts capable of being impounded and stored within this limitation will be allowed to flow downstream to Texas and Oklahoma for their respective use and development.

As set out in the Plaintiffs' Complaint, there exists in New Mexico at least 242,463 acre-feet of conservation storage available for impounding waters of the Canadian River below Conchas Dam. This storage capacity exceeds New Mexico's Compact apportionment by at least 42,463 acre-feet. The bulk of this excess stems from New Mexico's recent enlargement of Ute Reservoir, a reservoir on the Canadian River below Conchas Dam near the town of Logan. Ute Reservoir was originally constructed in 1963–1964, but was substantially enlarged by actions commenced in 1982 and completed in 1984. As enlarged, Ute Reservoir has a total impoundment capacity of 272,800 acre-feet. Approximately 235,718 acre-feet of that total capacity is available to, and usable by, New Mexico as "conservation storage." The remaining 37,082 acre-feet of capacity is either unreleasable dead storage or storage filled with sediment.

In an attempt to defend its excess conservation storage, New Mexico has adopted and advanced several erroneous, inflexible and unreasonable interpretations of key Compact provisions. The position it has relied upon most heavily is an unsound construction of Article II (d), which defines the phrase "conservation storage." Under that construction, New Mexico asserts that much of its present reservoir storage capacity below Conchas Dam is not "conservation storage," since it has been allocated by New Mexico for the impoundment, storage and permanent retention of water for recreation and fish and wildlife uses. New Mexico contends that, by contract between New Mexico state agencies, it is obligated to capture,and retain in storage,waters of the Canadian River for

such recreation and fish and wildlife uses. New Mexico further declares that such capacities involve waters stored but not "available for . . . subsequent release for domestic, municipal, irrigation and industrial uses," and, therefore, such capacities are not "conservation storage" under the Compact language of Article II (d). New Mexico asserts this position despite the fact that, because of the design and location of the outlet works in the dam and reservoir, most of such capacities are releasable for use in New Mexico. New Mexico has accordingly adopted, and continues to maintain, the position that reservoir storage capacity designated for such uses and purposes is not "conservation storage" for which it is accountable under the Compact, in any respect whatsoever, to the downstream states.

The New Mexico interpretation and position are clearly contrary to the Compact. New Mexico, under its interpretation, could impound and permanently retain in storage in New Mexico all waters of the Canadian River and thereby prevent any river flow to downstream states and users. To accomplish this, New Mexico would only need to designate additional reservoir storage capacities for recreation or fish and wildlife uses,or some other use or purpose not expressly mentioned in the Compact's definition of conservation storage, e.g., storage capacity for the capture and permanent retention of water which would not be available for subsequent release for Compact-mentioned uses and purposes. New Mexico has acknowledged that such a conclusion and consequence could result from its interpretation of the Compact. Transcript of proceedings, September 29, 1982, Meeting, Canadian River Commission, pgs. 17, 66–67.

The plain meaning and purpose of theCompact's Article II (d) definition of conservation storage is to include, for equitable apportionment purposes, reservoir storage capacities for the capture and retention of water within a signatory state for subsequent release for such uses as domestic, municipal, irrigation and industrial uses. In contrast to these capacities, the definition of conservation storage does not include storage capacities for the impoundment and retention of unusable

waters (dead storage allocated solely for sediment control) or waters retained on a temporary basis only, e.g., flood control and power production waters which would be temporarily captured but routinely released and allowed to flow unused to the downstream states. In other words, the obvious objective of the definition is to encompass and limit waters impounded by a signatory state for its beneficial use and enjoyment and which are not, therefore, available to downstream states. New Mexico's position that reservoir storage capacities for the capture and permanent retention of water for recreation or fish and wildlife purposes is not conservation storage for which it is accountable under the Compact is contrary to this objective, is totally unsound and unreasonable and, if not corrected, will defeat the very purposes of the Compact and render its apportionments meaningless.

In reliance on its erroneous construction of the Compact, New Mexico has exceeded Compact apportionment limitations, and has, of record, given notice of its plan and intention to exceed those limitations by even greater quantities. As noted in Plaintiffs' Complaint, New Mexico already has exceeded its Compact apportionment by roughly 42,000 acre-feet. On or about February 14, 1986, the New Mexico Interstate Stream Commission, a New Mexico state agency, filed its "Notice of Intention to Make Formal Application for Permit" with the New Mexico State Engineer. The notice expresses the plan and intention of the New Mexico Interstate Stream Commission to apply for a permit to appropriate "[a]ll unappropriated waters of the Canadian River and its tributaries between Ute Dam near Logan, New Mexico, and the New Mexico-Texas state line." According to the notice, the waters will be appropriated by "storage," as well as by direct diversion, and the appropriation would be for, among other things, recreation and fish and wildlife purposes.

Under New Mexico's wrongful construction and application of the Compact, these planned reservoir storage capacities for recreation and fish and wildlife purposes will be exempt from the Compact and will further diminish or eliminate Canadian River flows to the downstream states. The notice

has, therefore, had a chilling and detrimental effect on present and future development of Canadian River waters within Texas and Oklahoma, by causing great uncertainty as to the future availability and reliability of Canadian River flows from New Mexico.

Aside from New Mexico's planned construction of additional conservation storage capacities, New Mexico's present Compact violation of excess conservation storage is causing substantial and irreparable injury to Texas and its citizens and, if not remedied, will continue doing so indefinitely by preventing Texas from receiving the amount of water it is entitled to receive under the Compact. Most of the Canadian River waters Texas receives from New Mexico are captured in Lake Meredith, and are then distributed to eleven cities and towns in the arid Texas High Plains. These cities and towns, and their approximately 450,000 inhabitants, are greatly dependent upon these waters for drinking water and for other municipal and industrial uses since the Canadian River is the only substantial source of surface water in the region. See S. Rep. No. 2110, 81st Cong., 2d Sess., reprinted in 1950 U.S. Code Cong. Serv. 4284, 4286-7. The only substantial source of groundwater in the region, the Ogallala Aquifer, is a rapidly dehydrating aquifer and is not, therefore, a dependable or long-term alternative source of water. New Mexico's construction and maintenance of conservation storage in excess of the amount permitted under the Compact have reduced the yield of Lake Meredith and impaired the ability of the State of Texas to furnish water for the needs of its inhabitants. Consequently, the primary reasons that Texas entered into the Compact, i.e. to obtain an equitable share of Canadian River waters and to establish a dependable water supply reservoir (Lake Meredith) on the river for the Texas High Plains, have been substantially negated.

The New Mexico violation is also causing substantial and irreparable harm and injury to Oklahoma and its citizens. Since the construction and enlargement of New Mexico's Ute Reservoir and Texas' Lake Meredith, Canadian River flows from Texas into Oklahoma have declined from an amount

of approximately 591 cubic-feet per second to a post-construction average annual amount of approximately 84 cubic-feet per second. Unquestionably, the New Mexico Compact violation (excessive conservation storage) will cause greater quantities of Canadian River flow to be captured and retained by and in Texas and, in turn, will reduce flows into Oklahoma. This domino effect of the New Mexico violation deprives Oklahoma and its citizens of apportionments made under the Compact, jeopardizes the future use and enjoyment of existing developments on the Canadian River in Oklahoma, and prevents Oklahoma from proceeding with future planned developments which are dependent on Oklahoma receiving its share of Canadian River waters apportioned under the Compact.

Oklahoma and Texas have made repeated attempts to remedy the instant dispute by means of cooperation and through the good offices of the Canadian River Commission. Oklahoma, by its letter of July 28, 1982, to New Mexico, gave notice of its concerns regarding the then proposed Ute Reservoir enlargement and the resultant excess conservation storage under the Compact. This letter brought about the exchange of further correspondence and, ultimately, the calling of a special meeting of the Canadian River Commission on September 29, 1982. Although a meeting was held and the matter was discussed by the states at great length, New Mexico continued to maintain its position, and no resolution of the controversy was reached. The controversy was again brought before the commission at its regular annual meetings of April 14, 1983; March 6, 1984; April 2, 1985 and March 12, 1986. Because Commission action can be taken only by a unanimous vote of state commissioners, and because of New Mexico's veto ("no" vote) power, repeated attempts by Oklahoma and Texas to obtain remedial action and New Mexico's compliance through the Commission have been, and shall continue to be, prevented and defeated by New Mexico.

In addition to exhaustive discussions of the controversy by the commissioners at special and regular annual Commission

meetings, the Commission attempted to seek a resolution of the dispute through its Legal Advisory Committee. That Committee is composed of legal representatives from each of the signatory states. The Commission assigned to this Committee the task of researching and reporting on issues related directly to New Mexico's Ute Dam enlargement, e.g., questions relating to the meaning of conservation storage under the Compact. Although a report was submitted by the Texas and Oklahoma Legal Advisory Committee members to the Commission at its regular meeting of March 6, 1984, the New Mexico committee member submitted no statement of legal position on the questions assigned. Accordingly, attempts to resolve the controversy through the Commission's Legal Advisory Committee failed.

Oklahoma and Texas have pursued and exhausted every possible alternative for resolving this controversy. Despite their efforts, New Mexico has refused to alter its position and comply with the Compact. A non-judicial resolution of the dispute is not possible since a paralyzing impasse exists on the Commission, with no other or further remedial recourse being available to Oklahoma and Texas. Allowing this impasse and dispute to remain and continue unresolved will only serve to benefit New Mexico with continuing and increasing substantial harm and detriment to Texas and Oklahoma. The dispute and issues presented are amenable to judicial resolution, and no other means of resolution and remedy exist.

POINTS OF LAW

The present action is a controversy between the State of New Mexico and the States of Oklahoma and Texas. Jurisdiction is invoked under Article III, Section 2, Clause 2, of the United States Constitution, and 28 U.S.C. Section 1251(a)(1).

The controversy presented is a conflict of Oklahoma and Texas with New Mexico regarding their respective rights, and the rights of their citizens, in and to the waters of the Canadian River, an interstate stream. Decisions of the Court have recognized that controversies and conflicts of this particular

and specific nature are a proper subject for adjudication and determination by the Court through the invocation and exercise of its original and exclusive jurisdiction. *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Arizona v. California*, 373 U.S. 546 (1963); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Wyoming v. Colorado*, 259 U.S. 419 (1922). Specifically, the controversy presented seeks an adjudication and enforcement of rights established, and prior equitable apportionments made, by a compact apportioning the waters of an interstate stream between states signatory to the compact. In *Texas v. New Mexico*, 421 U.S. 927 (1975), the Court exercised its original and exclusive jurisdiction for purposes of adjudicating and resolving issues and conflicts of the same nature and magnitude presented here. See also, *Virginia v. West Virginia*, 206 U.S. 290 (1907).

As set out in the Complaint, New Mexico is acting, and shall continue to so act, if not prevented from doing so by decree of the Court, in violation and breach of its legal duties and obligations under the Canadian River Compact, 66 Stat. 74. That violation consists of New Mexico's constructing, possessing and maintaining conservation storage capacity in reservoirs in New Mexico on the Canadian River below Conchas Dam in excess of the capacity allowed under Article IV (b) of this Compact. That excess has caused, and shall continue to cause, if not remedied by decree of the Court, grave and irreparable harm and injury to Texas and Oklahoma and their citizens. By its own declarations of intent made of record, New Mexico shall continue in the future as it has in the past, violating the Compact by establishing and maintaining even greater quantities of conservation storage in New Mexico than its current excess. Upon New Mexico's implementing those intentions, the harm and injury currently being sustained by Oklahoma and Texas shall dramatically worsen. Accordingly, Plaintiffs' Complaint presents a justiciable controversy and question of federal law which can be determined and resolved only by the Court. See *Petty v. Tennessee-Missouri Commission*, 359 U.S. 275 (1959); *State ex rel. Dyer et al v. Sims*, 341 U.S. 22 (1951).

Oklahoma and Texas have pursued and exhausted every means possible by which the instant conflict and controversy might have been resolved without the necessity of proceedings before, and relief from, the Court. No other form of relief is available to Texas and Oklahoma for purposes of resolving the controversy and, absent the Court's exercise of jurisdiction, the substantial injury and harm presently being sustained shall not only continue, but shall unquestionably increase. Oklahoma and Texas seek nothing more than to be relieved of the wrongful harm and injury currently being sustained by them, and to have made and entered by the Court an appropriate decree commanding New Mexico's compliance with the terms and provisions of the Canadian River Compact and its duties and obligations thereunder. Oklahoma and Texas state that the Court's exercise of original jurisdiction in this cause will result in a prompt and efficient resolution of the current controversy, and that no other means for accomplishing that critical and essential result exist.

It is, therefore, respectfully requested by Oklahoma and Texas that their Motion for Leave to File Complaint be sustained and granted.

Respectfully submitted,

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v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S BRIEF IN OPPOSITION TO THE OKLAHOMA AND TEXAS MOTION FOR LEAVE TO FILE COMPLAINT

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On April 16, 1987, the State of New Mexico was served copies of the Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion filed by the State of Oklahoma and the State of Texas. New Mexico submits this brief in opposition to the motion pursuant to Supreme Court Rule 9.5. New Mexico received a ten-day extension of time to file a response, so that this brief is timely.

SUMMARY OF ARGUMENT

New Mexico opposes the motion because there is no actual controversy between the states to invoke the Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1251(a)(1) (1982). There is no actual or threatened impairment of the rights of Oklahoma and Texas, but merely the assumed, possible invasion of such rights. The Supreme Court should not issue a declaratory decree on technical questions, such as the meaning of terms in the Canadian River Compact, 66 Stat. 74 (1952). New Mexico has not violated the Compact; consequently, there is no controversy between the states that needs resolution, and litigation is unnecessary.

Oklahoma and Texas assert that New Mexico's violation of the Canadian River Compact has caused direct and irreparable harm. They further state that the violation has impaired substantially the yield of Lake Meredith in Texas and its ability to supply drinking water and other municipal and industrial requirements. Brief in Support of the Oklahoma and Texas Motion for Leave to File Complaint (Oklahoma-Texas Brief) at 23-24, 29-31.[1]

New Mexico could not have violated the Compact, under any interpretation of the Compact, before the enlargement of Ute Reservoir in 1984. After the enlargement, there could have

---

[1] Oklahoma and Texas allege that New Mexico's "violation" of the Compact contributed to a reduction in the flow of the Canadian River into Oklahoma from 591 to 84 cubic feet per second. Given that New Mexico had never stored in reservoirs in the drainage basin below Conchas Dam more than 183,300 acre-feet of water from *all* sources as of the date Oklahoma and Texas filed their complaint and motion, the allegation is without foundation because the Compact could not have been violated.

been a violation of the Compact only if the New Mexico Interstate Stream Commission, the state agency authorized to construct and manage the dam, had ignored the criteria which that agency had adopted for the dam's operation so as to ensure compliance with the Compact. It did not do so, as shown below.

STATEMENT OF FACTS

Oklahoma and Texas assert that New Mexico has violated the Canadian River Compact by: (1) having storage capacity in excess of 200,000 acre-feet available in the drainage basin of the Canadian River below Conchas Dam in New Mexico, Oklahoma-Texas Brief at 27; (2) having a sediment control pool at Ute Reservoir that is not dedicated solely to sediment control, Oklahoma-Texas Brief at 26-27; and (3) threatening to build and use additional reservoirs on the Canadian River, Oklahoma-Texas Brief at 28.

The following facts are salient. The New Mexico Legislature authorized the construction of Ute Dam and Reservoir in 1957. The initial stage was completed in 1963 with a reservoir capacity of 109,600 acre-feet. In 1984 the reservoir was enlarged to a total capacity of 272,800 acre-feet. The current capacity to store water is estimated to be 246,600 acre-feet. The remainder, at least 26,200 acre-feet, is filled by sediment.[2] Currently, New Mexico is storing in Ute Reservoir an estimated 180,900 acre-feet of water originating above Conchas Dam. The maximum amount of water originating in the Canadian River basin below Conchas Dam stored in all reservoirs below the dam in New Mexico is estimated to have been 121,400 acre-feet, occurring on March 6, 1987. The amounts of water actually stored in Ute Reservoir since 1963 are set forth in Appendix A.

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[2] *See infra* note 8.

1. Conservation Storage Capacity in Excess of 200,000 Acre-Feet Is Authorized by the Compact

Oklahoma and Texas argue that New Mexico is in violation of the Compact by having storage capacity in excess of 200,000 acre-feet available for conservation storage. Two Compact provisions specifically allow New Mexico to maintain conservation storage capacity in excess of 200,000 acre-feet.

Article IV(a) of the Compact[3] allows the use of conservation storage capacity in excess of 200,000 acre-feet in Ute Reservoir for the storage of water originating *above* Conchas Dam. On May 16, 1987, with an estimated 180,900 acre-feet of water that had spilled or been released from Conchas Dam in storage in Ute Reservoir, the inflow of water originating above and below Conchas Dam resulted in an uncontrolled spill from Ute Reservoir, even though the outlet gates had been opened fully for five weeks. The total amount of water originating in the Canadian River basin below Conchas Dam stored in Ute Reservoir has been estimated to be only about 65,700 acre-feet on May 16, 1987. Appendix B is a chart setting out the content of Ute Reservoir on relevant dates. A schematic representation of Ute Reservoir content as it relates to the operating criteria for the reservoir is attached as Appendix C.

Article VII of the Compact[4] clearly contemplates that New Mexico is entitled to have more than 200,000 acre-feet of

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[3] Article IV(a) states:
"New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam."

[4] Article VII states:
"The commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no state shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period
(Cont. on p. 5)

conservation storage capacity for waters originating below Conchas Dam to take advantage of Canadian River Commission permission to impound more water than the amount set forth in Article IV. Article VII would be meaningless if New Mexico is not allowed to have storage capacity available to take advantage of Article VII's provisions.

2. The Ute Reservoir Sediment Control Pool Is Not Conservation Storage Under the Compact

Oklahoma and Texas contend because New Mexico allows recreation on the pool of water at Ute Reservoir dedicated to sediment control, that pool of water is "conservation storage" for the reason it is not used solely for sediment control. Oklahoma-Texas Brief at 26-27.[5]

Oklahoma and Texas fail to consider how New Mexico has addressed sediment control at Ute Reservoir. It is important to understand the operating criteria which the Interstate Stream Commission first adopted for the operation of Ute Reservoir in 1984. These criteria were updated in 1985. The 1984 and 1985 criteria were furnished to the Canadian River Commission.

In designing works such as the Ute Dam and Reservoir, the usual first step is to determine the practicable storage capacity at the site selected. In the course of design development, the

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[4] (Cont. from p. 4)
not exceeding twelve (12) months; and provided further that no state or user of water within any state shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded."

[5] The fact that Ute Reservoir is storing at least an estimated 180,900 acre-feet of water originating above Conchas Dam makes the Oklahoma and Texas argument on this point moot. *See* page 4 *supra*. The merits of the argument by Oklahoma and Texas are addressed here.

storage space is allocated to various functions. Dead storage capacity is that capacity below the outlet works or the pumping plants to be used to take water from the reservoir. Inactive storage capacity is that capacity established by operating criteria below which no water will be released or withdrawn from storage. The average annual sediment inflow is estimated and a capacity adequate for 50 to 100 years of sediment inflow usually is allocated for sediment control. A part of the sediment control capacity is designated "inactive," creating a minimum pool of water to enhance sediment retention. This improves downstream channel conditions and provides reasonably silt-free water for domestic, municipal and industrial uses. The latter purpose is particularly important where water is to be withdrawn from the reservoir for those uses by pumping plants, as is the case at Ute Reservoir.[6]

Operating criteria usually are formulated to control storage space allocation. The rules formulated for Ute Reservoir in 1984 and revised in 1985 ensure against any violation of Article IV(b) of the Canadian River Compact.[7] In 1984, the total capacity of Ute Reservoir was 272,800 acre-feet. The operating criteria for Ute Reservoir establish a sediment control pool at elevation 3741.6 feet above sea level to desilt water for domestic, municipal, irrigation and industrial uses. In 1984, the reservoir's capacity to store water above the sediment control pool at elevation 3741.6 was 210,600 acre-feet. Under

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[6] Space also may be allocated to flood control based on projected flood flows and the downstream need for flood protection. No space in the Ute Reservoir is allocated for flood control.

[7] Article IV(b) states:
"New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet."

the Ute Reservoir operating criteria the maximum conservation storage capacity in Ute Reservoir after enlargement was and is never more than 197,700 acre-feet. This results in a difference of 12,900 acre-feet from the reservoir's total capacity to store water above the sediment control pool. Based upon the average inflow for the 1939-83 period, the 12,900 acre-feet of space will be filled by sediment deposition by about 1995. It would have been unreasonable for New Mexico not to include capacity for future sediment deposition in Ute Reservoir up to the practicable storage limitation of the site.

The capacity of Ute Reservoir below elevation 3741.6 is 49,900 acre-feet. Of that capacity, an estimated 13,900 acre-feet was occupied by sediment at the end of 1983, leaving a sediment control pool of 36,000 acre-feet at that time.[8] The volume of the sediment control pool is not accountable as a part of conservation storage because it is not *available* under the operating criteria for release for "domestic, municipal, irrigation and industrial uses," or any other uses. Compact Article II(d).[9] Storage for sediment control is expressly excluded from the definition of conservation storage. *Id.* Because recreation is allowed on the sediment control pool, Oklahoma and Texas contend that the capacity below that level must be accounted as conservation storage. New Mexico could meet this contention by simply raising the outlet works and installing

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[8] Sediment in Ute Reservoir above elevation 3741.6 occupied 12,300 acre-feet of the capacity of the reservoir at the end of 1983. Total sediment in the reservoir at that time occupied 26,200 acre-feet of the capacity.

[9] Article II(d) states:
"The term 'conservation storage' means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them."

any future pumping plant at a level above the minimum or sediment control pool. But their contention is without merit given the terms of the Compact and invites no subterfuge.

Because the purpose of storage below elevation 3741.6 is for sediment control, and the water stored is not available for release, recreational and fish and wildlife uses of water below that elevation do not change sediment control storage into conservation storage. The fallacy of the Oklahoma and Texas position is made clear by comparing incidental recreational use of a minimum power pool or a flood control pool. Such use clearly would not change the character of that storage. Because "conservation storage" can be limited by operating criteria, New Mexico is in compliance with the Compact unless and until those criteria are ignored.

3. Other Reservoirs Below Conchas Dam Pose No Violation of the Compact

There are eleven reservoirs, other than Ute Reservoir, within the drainage basin of the Canadian River below Conchas Dam with capacities greater than 100 acre-feet. Eight reservoirs with a total capacity of approximately 2,300 acre-feet make water available for release for irrigation use. Three reservoirs are maintained to their maximum controlled capacity of approximately 4,500 acre-feet for recreation, fish and wildlife, and stock watering purposes.

Because the capacities of the first eight reservoirs noted above constitute "conservation storage" as defined by the Compact, New Mexico's operating criteria provide that no more than 197,700 (200,000 – 2,300) acre-feet of the capacity of Ute Reservoir may be allocated to conservation storage. Factually, no portion of the capacities of the three remaining reservoirs is available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses.

On the other hand, it cannot be said that any portion of the capacity of these three reservoirs is allocated solely to flood control, power production, or sediment control. These facts lead to the conclusion that there is a hiatus in the Compact definition of "conservation storage" that results in no part of the capacity of the three reservoirs falling within the definition of conservation storage and no part of the capacity of those reservoirs that is specifically excluded from that definition. Because the present magnitude of the storage capacity involved would be so small after deducting the volumes of sediment deposited, whether the remaining capacity should be accounted as conservation storage is of little moment.

Oklahoma and Texas assert that New Mexico is threatening to build additional reservoirs with resultant harm to Texas and Oklahoma. Oklahoma-Texas Brief at 28. This allegation is based on a 1986 Notice of Intention to Make Formal Application for Permit filed by the Interstate Stream Commission for waters of the Canadian River below Conchas Dam. The Notice of Intention cannot be construed to indicate an intention to develop conservation storage for waters originating below Conchas Dam in excess of the 200,000 acre-feet authorized by the Compact. With average water supply, by about 1995, sediment deposition will take up so much of the storage capacity of Ute Reservoir that it would be physically impossible for New Mexico to have more than 197,700 acre-feet of storage capacity above the minimum or sediment control pool. The notice does reserve to the Interstate Stream Commission the right to develop additional conservation storage, as necessary, to offset sediment deposition. New Mexico currently has no plans to proceed with development under the notice, or funds to develop such plans.

ARGUMENT

The original jurisdiction of the Supreme Court should be invoked sparingly and the Court is obligated to exercise it only in appropriate cases. A state must have a serious claim necessary for its protection. *Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976); *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972). *See also Massachusetts v. Missouri,* 308 U.S. 1, 15 (1939). The Court cannot issue declaratory decrees. An original action may be dismissed if it is based not on any "actual or threatened impairment" of a right but upon "assumed potential invasions" of a right. If there is no allegation of definite physical acts which are interfering or will interfere with a state's right to make further appropriations of water, the complaint should be dismissed without prejudice. *Arizona v. California,* 283 U.S. 423, 462-64 (1931). *De minimis non curat lex.*

New Mexico has never stored more than 200,000 acre-feet of water originating in the Canadian River basin below Conchas Dam. New Mexico has adopted operating criteria for Ute Reservoir which prohibit its "conservation storage" of more than 197,700 acre-feet for water originating below Conchas Dam. In fact, New Mexico is now storing at least 180,900 acre-feet of water originating above Conchas Dam at Ute Reservoir. Given these facts, the issues raised by Oklahoma and Texas are without merit. *See Alabama v. Texas,* 347 U.S. 272 (1954).

CONCLUSION

For all the above reasons, New Mexico requests the Court either to deny without prejudice the Oklahoma and Texas Motion for Leave to File Complaint or to order Oklahoma

and Texas to make a more definite statement in their complaint on the nature and extent of any alleged past, present or future injury to their rights under the Canadian River Compact.

Respectfully submitted,

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June 25, 1987

MONTH END RESERVOIR CONTENTS

UTE RESERVOIR

UNITS = ACRE-FEET

	TOTAL STORAGE											
YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1963					7,530	10,250	11,750	23,150	25,500	24,940	24,520	24,100
1964	24,100	24,520	24,520	23,970	24,520	23,420	22,620	23,970	32,380	31,200	30,700	30,700
1965	30,370	30,050	30,530	29,410	33,600	68,790	83,050	109,200	105,500	90,510	87,260	86,550
1966	86,190	86,550	85,490	84,430	83,050	90,880	95,340	110,000 *	107,900	105,500	104,300	103,100
1967	102,300	101,500	100,300	98,400	103,100	109,200	109,600	109,200	109,200	100,300	96,100	95,720
1968	95,340	94,970	94,590	94,210	92,720	91,240	93,470	99,560	98,020	97,250	95,720	94,970
1969	94,210	94,210	93,090	92,350	102,700	109,200	109,600	110,000 *	106,300	99,170	100,300	100,300
1970	100,700	100,300	99,950	103,100	101,900	99,950	101,300	97,630	97,630	96,100	94,970	94,210
1971	93,090	92,720	92,350	91,980	98,020	98,400	99,170	98,020	96,480	95,720	96,480	96,100
1972	95,720	94,590	93,470	91,980	90,880	90,140	106,300	109,600	100,300	99,170	99,560	99,560
1973	99,170	99,170	99,170	100,700	99,950	99,170	102,300	99,170	98,400	97,630	94,970	93,840
1974	94,590	93,910	92,910	91,430	89,560	87,220	85,420	86,300	87,690	90,950	89,360	89,200
1975	89,240	89,340	88,690	87,400	86,330	89,020	93,170	92,910	91,980	89,850	88,870	88,330
1976	87,620	87,290	85,350	84,850	83,770	83,670	89,560	88,010	91,350 *	89,490	88,480	87,720
1977	70,750	70,590	69,270	74,360	82,850	82,010	81,070	85,460	79,580	77,930	76,540	75,360
1978	75,000	74,800	74,190	72,430	71,820	78,300	77,070	75,270	73,390	71,540	77,530	76,800
1979	76,700	76,740	76,110	75,790	81,380	82,280	84,180	91,010 *	89,640	87,800	83,000	82,420
1980	78,970	69,550	68,870	69,600	74,390	73,070	71,030	73,360	76,940	75,530	75,040	74,550
1981	74,190	73,810	73,290	68,400	68,220	66,800	67,630	89,070	83,720	82,600	81,900	81,310
1982	80,900	80,630	79,850	78,600	82,940	91,600 *	93,560 *	85,570	71,030	62,720	45,800	41,860
1983	39,720	39,100	39,480	36,900	37,080	37,920	36,420	35,170	34,560	34,720	33,530	33,610
1984	32,500	32,370	32,200	31,940	31,400	32,780	32,690	41,050	40,340	42,600	43,000	43,600
1985	43,700	44,000	45,700	46,100	49,900	51,000	49,600	52,800	52,700	75,770	75,430	75,080
1986	76,460	77,150	76,810	76,120	75,770	88,430	86,180	86,920	94,240	95,430	108,420	108,840
1987	111,090	120,890	162,270	205,310	248,200 *							
MEAN	77,193	77,031	78,269	79,573	80,063	76,448	78,420	82,183	81,032	79,768	78,833	78,244

* RESERVOIR WAS SPILLING

NOTE: AREA-CAPACITY TABLE DATED DECEMBER 1963 IN EFFECT FROM JANUARY 1963 THROUGH DECEMBER 1976.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 109,600 AF)
AREA-CAPACITY TABLE BASED ON DECEMBER 1975-JANUARY 1976 RESURVEY IN EFFECT FROM JANUARY 1977 THROUGH DECEMBER 1983.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 90,500 AF)
AREA-CAPACITY TABLE BASED ON 1983 RESURVEY IN EFFECT FROM JANUARY 1984 THROUGH THE PRESENT.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 246,600 AF)

APPENDIX A

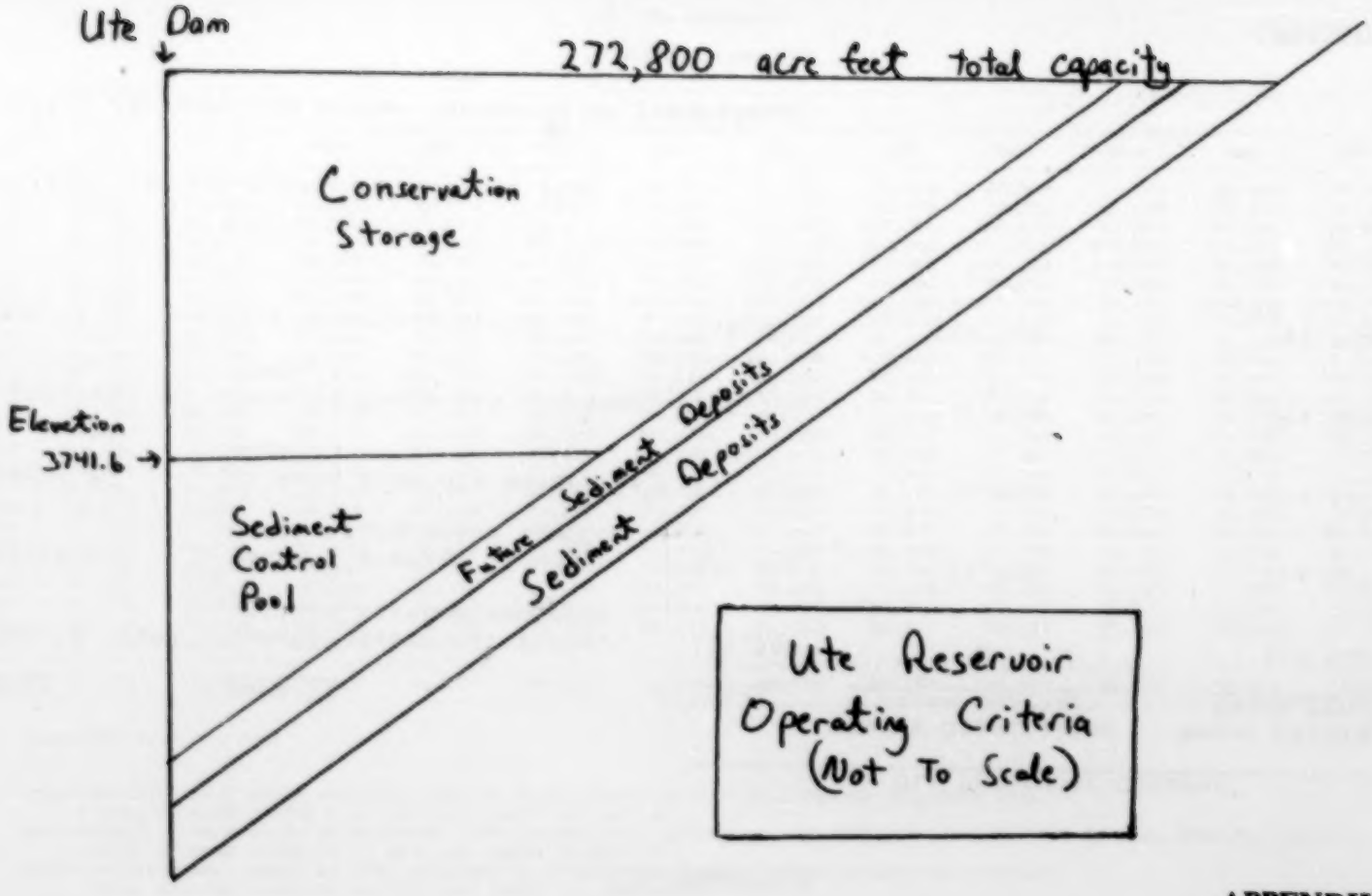
UTE RESERVOIR

Date	Remarks	Ute Reservoir Content*		
		Total	Water Originating Above Conchas	Water Originating Below Conchas
Feb. 6, 1987	Conchas Reservoir fills, spill & release commence	112,500	0	112,500
March 6	Maximum storage of water originating below Conchas	126,400	11,800	114,600
April 8	Release from Ute Reservoir begun	172,400	59,000	113,400
April 16	Date of Texas and Oklahoma Complaint	176,500	71,900	104,600
May 16	Ute Reservoir spills	246,600	180,900	65,700

* Includes water below elevation 3741.6.

NOTE: All data are either estimated or provisional.

APPENDIX B



Ute Reservoir Operating Criteria (Not To Scale)

APPENDIX C

(3)

Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S ANSWER

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December 4, 1987

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

ANSWER

The State of New Mexico, by its Attorney General, the Honorable Hal Stratton, answers the Complaint filed by the States of Oklahoma and Texas seeking a decree concerning rights and obligations under the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74 ("Compact"), as follows:

1. Paragraph 1 of the Complaint is admitted.

2. Paragraph 2 of the Complaint is admitted.

3. Paragraph 3 of the Complaint is admitted, except that the correct citation for New Mexico's current compilation of the Act of February 7, 1951, is § 72-15-2 N.M. Stat. Ann. 1978 (1985 Repl. Pamph.).

4. In response to Paragraph 4 of the Complaint, New Mexico states that Article I of the Compact speaks for itself as to the principal purposes of the Compact.

5. Paragraph 5 of the Complaint is admitted.

6. In response to Paragraph 6 of the Complaint, New Mexico admits that Article II(d) of the Compact defines the term "conservation storage" in the language stated by Oklahoma and Texas. New Mexico denies, however, that the Compact imposes specific numerical limitations regarding the use of waters of the Canadian River flowing through New Mexico, because New Mexico has free and unrestricted use of all waters of the Canadian River arising in New Mexico, according to Article IV of the Compact. New Mexico also denies that the Compact limits the amount of conservation storage which may be available in New Mexico, because Article IV(b) of the Compact limits only the conservation storage available for impounding the waters of the Canadian River arising below Conchas Dam in New Mexico, and because Article VII of the Compact implicitly permits reservoir capacity in excess of the limit set out in Article IV(b) to allow New Mexico to seek the permission of Oklahoma and Texas for extra conservation storage on a temporary basis.

7. In response to Paragraph 7 of the Complaint, New Mexico admits that the Compact equitably apportions the waters of the Canadian River. New Mexico denies that the Compact imposes an absolute limitation on conservation storage in New Mexico. Article IV(b) of the Compact limits only conservation storage in New Mexico for waters of the Canadian

River arising below Conchas Dam. Furthermore, Article VII of the Compact implicitly allows reservoir capacity in excess of the limit set out in Article IV(b), as explained in Paragraph 6 above. New Mexico also denies that the Compact assures Texas and Oklahoma continuous and dependable quantities of Canadian River flow. New Mexico has free and unrestricted use of all Canadian River flow that arises in New Mexico, except for the limit in Article IV(b) of the Compact on conservation storage available for impounding waters of the Canadian River originating below Conchas Dam in New Mexico, unless permission is obtained to exceed those limits pursuant to Article VII of the Compact.

8. In response to Paragraph 8 of the Complaint, New Mexico admits that twelve reservoirs, including Ute Reservoir, with capacities greater than 100 acre-feet are located within the drainage basin of the Canadian River below Conchas Dam in New Mexico. New Mexico further admits that it and its citizens place substantial dependence on the waters of the Canadian River for irrigation, municipal, industrial, domestic, recreation, and fish and wildlife maintenance purposes in New Mexico. As to all other allegations of the Paragraph, New Mexico lacks sufficient knowledge to affirm or deny the allegations, and therefore denies them. In particular, New Mexico states that the Canadian River, as defined by Article II(a) of the Compact, includes the North Canadian River. Under this definition, about 4.6 million acre-feet of total reservoir storage development has been established on the waters of the Canadian River in the three states. New Mexico denies, however, that reservoir storage capacity is equivalent to conservation storage capacity. The 4.6 million acre-feet of total capacity involves about two hundred sixteen reservoirs constructed on the Canadian River as defined by the Compact, including forty-nine such reservoirs in New Mexico.

9. In response to Paragraph 9 of the Complaint, New Mexico admits that Article IV(b) of the Compact allows New Mexico free and unrestricted use of all waters originating in the Canadian River basin in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impoundment of such waters is limited to an aggregate of two hundred thousand (200,000) acre-feet. New Mexico denies that Article IV(b) of the Compact refers to reservoir storage capacity physically in place below Conchas Dam. Article IV(b) refers to conservation storage capacity in New Mexico available for the storage of water arising in the Canadian River basin below Conchas Dam. New Mexico also denies that the Compact absolutely limits New Mexico's conservation storage of such waters to the amount stated in Article IV(b), because of the provisions of Article VII of the Compact. Article VII of the Compact implicitly allows storage capacity of New Mexico reservoirs in excess of the amount provided in Article IV(b), as explained above at Paragraphs 6 and 7.

Furthermore, Article IV(a) states that New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of the Canadian River above Conchas Dam, with no limitation on conservation storage of such waters. Conservation storage of waters originating in the drainage basin of the Canadian River above Conchas Dam in New Mexico is not limited by the Compact. The same reservoirs that have a limited capacity available for the storage of waters arising below Conchas Dam may have an additional unlimited capacity for the storage of waters arising above Conchas Dam in the Canadian River basin. The place of origin of water, not the place of its storage, controls.

10. In response to Paragraph 10 of the Complaint, the first four sentences of the Paragraph, dealing with the history of Ute Dam and Reservoir, are admitted, except that the initial

stage of the project was completed in 1963. New Mexico denies the remainder of the paragraph. New Mexico denies that any more than 197,700 acre-feet of Ute Reservoir's capacity is available for conservation storage of waters originating below Conchas Dam. New Mexico also denies that the total sediment and dead storage in Ute Reservoir occupy less than 63,990 acre-feet.

11. In response to Paragraph 11 of the Complaint, New Mexico denies that Clayton Lake (wrongly named Clayton Reservoir in the Complaint) contains any conservation storage, because no part of its capacity is available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them. New Mexico also denies that Hittson Creek and Aragon Reservoirs contain any conservation storage, for the same reason. New Mexico states that the other eight listed reservoirs have a total capacity of about 2,260 acre-feet, part of which is occupied by sediment and the remainder of which is accountable as conservation storage under the Compact. The paragraph is otherwise denied.

12. New Mexico denies all allegations of Paragraph 12 of the Complaint. Specifically, New Mexico denies that Ute Reservoir has a conservation storage capacity available for the storage of water arising below Conchas Dam in excess of 197,700 acre-feet, and that other small reservoirs listed in Paragraph 11 of the Complaint have total combined conservation storage capacities in excess of 2,260 acre-feet. The allegation that New Mexico is in violation of the Compact is a legal conclusion which requires no response. New Mexico denies, however, that it violates the Compact, and denies that it violates the Compact by virtue of the capacity of the reservoirs on the Canadian River. New Mexico also denies that it would knowingly and willfully violate the terms of the Compact at all.

13. The first sentence of Paragraph 13 of the Complaint in part states a legal conclusion which to that extent requires no response. New Mexico denies that it has violated the Compact. New Mexico has not prevented Texas from receiving the Canadian River water to which Texas is entitled under the Compact. Other allegations in the paragraph concerning events in Texas are matters about which New Mexico lacks sufficient information to form an opinion, and are therefore denied. New Mexico denies that Texas has been harmed as it alleges.

14. In response to Paragraph 14 of the Complaint, the first sentence in part states a legal conclusion which to that extent requires no response. New Mexico denies that it has violated the Compact. New Mexico has not prevented either Oklahoma or Texas from receiving the Canadian River water to which Oklahoma or Texas is entitled under the Compact. New Mexico admits that the construction of Lake Meredith has caused Canadian River flow into Oklahoma to decline. New Mexico admits that Canadian River flow into Oklahoma declined in the twenty-one year period since 1964, the time Lake Meredith went into operation, from an average of 549 cubic feet per second to an average of 87 cubic feet per second. New Mexico lacks sufficient knowledge to affirm or deny the specific amount of decline, if any, of Canadian River flow into Oklahoma attributable to either Ute Reservoir or Lake Meredith, or both of them, and therefore denies the allegation concerning the same. New Mexico denies that the Compact allows either Oklahoma or Texas a specific amount of Canadian River water. Article IV of the Compact gives New Mexico free and unrestricted use of all water in the Canadian River basin in New Mexico, provided only that New Mexico's conservation storage of water arising in the Canadian River basin below Conchas Dam is limited by Article IV(b), which in turn must be read in *pari materia* with Article VII of the Compact. New Mexico lacks sufficient information to

affirm or deny Oklahoma's plans for future reservoir developments in the Canadian River basin in Oklahoma, and therefore denies the allegations concerning the same. New Mexico denies that its actions have impaired Oklahoma's ability under the Compact to proceed with its planned developments in the Canadian River basin, or have harmed Oklahoma in any other way.

15. The first three sentences of Paragraph 15 of the Complaint are admitted. New Mexico admits that it has refused to acknowledge any violation of the Compact, because no such violation has occurred. New Mexico denies that it refuses to cease its violation of and comply with its duties and obligations under the Compact, because New Mexico has not violated the Compact, nor has it failed to comply with its duties and obligations thereunder.

16. Paragraph 16 of the Complaint is denied. New Mexico denies any and all characterizations of its position made by Texas and Oklahoma. Specifically, New Mexico denies that it has made any excuses for Compact violations because New Mexico has not violated the Compact. New Mexico denies the allegation concerning the purposes of an "intrastate agency contract." New Mexico denies that it has ever asserted that it possesses conservation storage capacity for use in excess of the amounts allowed under the Compact. New Mexico denies that it has the physical capability to construct and maintain unlimited reservoir storage capacity regarding the waters of the Canadian River in New Mexico.

17. The first two sentences of Paragraph 17 of the Complaint in part state legal conclusions as to which a response is to that extent unnecessary. In further response to Paragraph 17, New Mexico denies that it has violated the Compact or harmed Texas and Oklahoma, or either of them. New Mexico denies any plan on its part to create within the Canadian River basin below Conchas Dam, pursuant to the Interstate Stream Commission's

"Notice of Intention To Make Formal Application For Permit," conservation storage facilities in excess of the limit established by Article IV(b). The last three sentences of Paragraph 17 are otherwise admitted.

18. In response to Paragraph 18 of the Complaint, New Mexico states that the said paragraph contains numerous legal conclusions, concerning exhaustion of remedies and similar topics, as to which a response is to that extent unnecessary. New Mexico specifically denies that Texas and Oklahoma have heretofore pursued and found fruitless all possible remedies, other than litigation, to settle the issues raised in the Complaint. New Mexico also denies that it has violated and not complied with the Compact, and that New Mexico has caused any injury to Texas and Oklahoma, or either of them.

AFFIRMATIVE DEFENSES

1. Article VII of the Compact allows New Mexico and Texas to have storage capacity within the Canadian River basin in those two states in excess of the conservation storage limits provided in Articles IV and V of the Compact. Article IV limits certain conservation storage capacity in New Mexico; Article V limits conservation storage in Texas. Subject to certain limitations, Article VII allows each state to be permitted by the Canadian River Commission ("Commission") to impound temporarily more water than the amounts set forth in Articles IV and V, respectively. In New Mexico's case, Article VII clearly contemplates that New Mexico is entitled to have more than two hundred thousand (200,000) acre-feet of conservation storage capacity capable of storing waters originating below Conchas Dam so as to be able to take advantage of temporary Commission permission to impound excess amounts under Article VII.

2. Article IV(a) of the Compact allows the unlimited use of Ute Reservoir for the storage of waters originating in the Canadian River basin above Conchas Dam. Article IV(a) allows New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." The maximum water storage in Ute Reservoir occurred on May 16, 1987, when the Reservoir spilled. The amount of water in storage, including that in the sediment retention, or desilting, pool, which is not accountable as conservation storage, was 246,600 acre-feet. Of that amount, approximately 180,900 acre-feet originated above Conchas Dam. Water that originated above Conchas Dam reached Ute Reservoir as a result of spills and releases at Conchas Dam which were commenced on February 6, 1987. On April 16, 1987, the date of filing of the Texas and Oklahoma Complaint, the total amount of water in storage in Ute Reservoir, including the water in the desilting pool, was 176,500 acre-feet, of which approximately 71,900 acre-feet originated above Conchas Dam. The Article IV(b) limit on conservation storage of water originating below Conchas Dam has never been approached and cannot reasonably be predicted to be threatened.

3. The Operating Criteria for Ute Reservoir prohibit the conservation storage of water arising below Conchas Dam in excess of 197,700 acre-feet. (The remaining 2,300 acre-feet of New Mexico's conservation storage entitlement under Article IV(b) of the Compact is allocated to smaller reservoirs in the Canadian River drainage basin below Conchas Dam.) New Mexico's compliance with the provisions of Article IV(b) of the Compact is assured by the Operating Criteria, because no reservoir capacity in excess of the limit of Article IV(b) can be available for storage of water arising below Conchas Dam for subsequent release for domestic, municipal, irrigation and industrial purposes, or any of them.

4. The storage capacities of Clayton Lake and Hittson Creek and Aragon Reservoirs do not constitute conservation storage as defined in the Compact, because no portion of the capacities of those reservoirs is factually available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them. These reservoirs are maintained to their maximum controlled capacity of approximately 4,500 acre-feet for recreation, fish and wildlife, and stock watering purposes. No water is available for release from these three reservoirs. A portion of the total capacities of these reservoirs, moreover, is occupied by sediment.

WHEREFORE, New Mexico prays that Oklahoma and Texas take nothing and that their Complaint be dismissed.

Respectfully submitted,

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December 4, 1987

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No. 109, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA and STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND SUPPLEMENTAL COMPLAINT

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November 18, 1988

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IN THE
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OCTOBER TERM, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Texas and Oklahoma hereby move the court for leave to file their Supplemental Complaint. The grounds for this motion are that since the filing of the original Complaint, new facts and events have occurred that are material to this action, as is more fully shown in the proposed Supplemental Complaint, which is submitted herewith.

November 18, 1988

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No. 109, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA and
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v.

STATE OF NEW MEXICO,

Defendant.

SUPPLEMENTAL COMPLAINT

1. The State of Oklahoma and the State of Texas (Plaintiffs) filed their original joint Complaint against the State of New Mexico (Defendant) on April 16, 1987. The Complaint alleges, *inter alia*, that New Mexico is violating the Canadian River Compact (Compact) by maintaining conservation storage in excess of the amount allowed by the terms of the Compact. More specifically, the Complaint alleges that the conservation storage capacity of the recently enlarged Ute Reservoir, when added to the conservation storage capacities of other reservoirs, gives New Mexico approximately 242,463 acre-feet of total conservation storage on the Canadian River and its tributaries below Conchas Dam. This is 42,463 acre-feet in excess of the limitation on conservation storage imposed upon New Mexico by Article IV(b) of the Compact. Approximately 5,180 acre-feet of this excess conservation storage is in the North Canadian River basin.

2. Plaintiffs have recently learned that New Mexico is also maintaining at least 1,014 acre-feet of additional conservation storage in the drainage basin of the Canadian River below Conchas Dam, 63 acre-feet of which is in the North Canadian River basin. Each of these reservoirs has an impounding capacity of 100 acre-feet or less and, in accordance with the current reporting policy of the Canadian River Commission, has not been

reported by New Mexico to the Commission. These reservoirs give New Mexico at least 1,014 acre-feet of excess conservation storage below Conchas Dam in addition to the excess conservation storage alleged in the original Complaint.

3. Subsequent to the filing of the original Complaint, New Mexico impounded more than 200,000 acre-feet of water in the conservation storage capacities of the reservoirs in New Mexico in the drainage basin of the Canadian River below Conchas Dam. On or about April 28, 1987, the amount of water impounded in conservation storage capacity in Ute Reservoir, when combined with the amount of water impounded in the conservation storage capacities of other reservoirs below Conchas Dam, exceeded the maximum amount of water that can be impounded in the 200,000 acre-feet of conservation storage allowed by the Compact. New Mexico has continuously impounded water in excess of this amount since that date.

4. The water surface reached the top of the spillway at Ute Dam on May 16, 1987, and remained at or above that elevation for at least 29 days. At spillway crest Ute Reservoir impounds 246,617 acre-feet of water, including 235,718 acre-feet of water in conservation storage. The excess 35,718 acre-feet impounded in Ute Reservoir and the approximately 7,774 acre-feet impounded in the conservation storage capacities of the other reservoirs below Conchas Dam, amount to 43,492 acre-feet of water wrongfully impounded on each of the 29 days.

5. New Mexico has continued to impound substantial amounts of water in conservation storage in excess of the Article IV(b) limitation. Since May 7, 1987, Ute Reservoir has continuously contained at least 220,400 acre-feet of water, including 209,501 acre-feet of water in conservation storage. As of October 31, 1988, Ute Reservoir was impounding 235,600 acre-feet of water, including 224,701 acre-feet of water in conservation storage.

6. The Compact violations by New Mexico set forth in the original Complaint have resulted in the wrongful impoundment of waters in conservation storage in excess of the 200,000 acre-feet of conservation storage allowed by the Compact. New

Mexico's impoundment of these waters has damaged Plaintiffs by denying to Plaintiffs waters to which they are entitled.

7. New Mexico has further damaged Plaintiffs by failing to immediately release all waters in excess of 200,000 acre-feet impounded in conservation storage. Even if some of those waters were subsequently released, the additional evaporation and seepage caused by the delay has decreased the amount of Canadian River water available to the Plaintiffs.

8. The wrongful denial or delay of waters to the Plaintiffs has impaired Plaintiffs' ability to use the Canadian River flows as a dependable source of water for their inhabitants. Until New Mexico complies with the Canadian River Compact, Plaintiffs will continue to be denied their equitable share of Canadian River flows under the Compact.

WHEREFORE, Plaintiffs respectfully pray that, in addition to the relief requested in their original Complaint, the Court enjoin New Mexico to immediately reduce and maintain all waters impounded in the conservation storage capacities of reservoirs below Conchas Dam to not more than the 200,000 acre-feet of conservation storage authorized under Article IV(b) of the Compact. Plaintiffs further pray that New Mexico be ordered to release that amount of additional water lost because of New Mexico's delay in releasing waters as required under the Compact. Plaintiffs further pray for all consequential monetary damages resulting from New Mexico's unlawful acts as alleged above. Alternatively, Plaintiffs request monetary damages in an amount equal to the value of the water wrongfully denied or untimely released to the Plaintiffs by New Mexico and all consequential damages resulting therefrom. Plaintiffs further pray for such other and further relief as the Court may deem proper.

November 18, 1988

Respectfully submitted,

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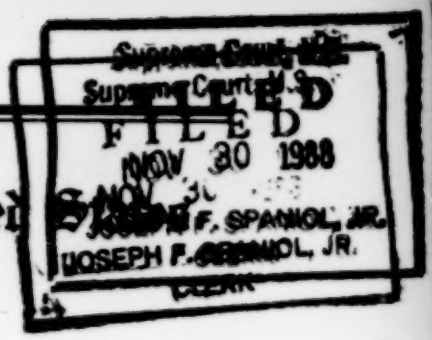

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

V.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

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No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

V.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

New Mexico does not oppose plaintiffs' November 18, 1988 Motion for Leave to File Supplemental Complaint. New Mexico requests, if the motion is granted, leave to file a supplemental answer under Rule 15(d), Fed.R.Civ.P., and Rule 9.2, Rules of the Supreme Court of the United States.

Dated November 30, 1988.

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IN THE

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October Term, 1988

STATE OF OKLAHOMA and
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Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER, MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER, AND SUPPLEMENTAL ANSWER

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No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
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STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

New Mexico requests permission to file its Supplemental Answer pursuant to Rule 15(d), Fed. R. Civ. P., and Rule 9.2, Rules of the Supreme Court of the United States. The Court granted the unopposed motion by Oklahoma and Texas for leave to file a Supplemental Complaint on December 12, 1988. The allegations raised in the Supplemental Complaint assert a new claim for relief and therefore require response by New Mexico and raise the need for New Mexico to state a supplemental affirmative defense. Because the plaintiffs object to this motion, the grounds in support of the motion are set forth more fully in the accompanying memorandum.

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IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

Rule 9.2 of the Rules of the Supreme Court of the United States refers to the Federal Rules of Civil Procedure to guide practice in original actions in this Court. The philosophy of Rule 15 of the Federal Rules of Civil Procedure is that amendments of the pleadings are to be freely granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit . . . . Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 227 (1964).

Leave to file a supplemental pleading under Rule 15(d) is within the discretion of the Court and should be freely granted when to do so will promote the justiciable disposition of the case without causing undue prejudice. *Bates v. Western Electric*, 420 F.Supp. 521, 525 (E.D. Pa. 1976). *See also* 3 *Moore's Federal Practice* ¶ 15.16[2] at 15-179 (1988). Rule 15(d) applies to defensive pleadings as well as to complaints. *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984); *Weekes v. Atlantic National Ins. Co.*, 370 F.2d 264, 271-72 (9th Cir. 1966). Rule 15(d) motions should be viewed with the same liberal principles applicable to motions to amend under Rule 15(a). *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980); *Soler v. G & U, Inc.*, 103 F.R.D. 69, 73 (S.D.N.Y. 1984). The rules relating to amended and supplemental pleadings were promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982).

A responsive pleading presumably will not be necessary when the supplemental pleading does not contain anything that deviates from the original pleading; where, however, a new claim is added by the supplemental pleading, a response is desirable. *Cf. Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1188-89 (3d Cir. 1979). Requests to supplement the pleadings, like motions to amend, should be freely granted to permit the economic resolution of all related disputes between the parties. *Coca-Cola Bottling Co. of Elizabethtown v. Coca Cola Co.*, 668 F.Supp. 906, 922-23 (D. Del. 1987). Where the contents of the proposed pleadings are continuations of those things originally alleged, it is proper to file an amended, rather than supplemental, complaint. *United States v. International Bus. Machines Corp.*, 66 F.R.D. 223 (S.D.N.Y. 1975). In any case, whether a pleading is denominated "amended" or "supplemental" is of less importance than the substance of that pleading and the general policy of Rule 15 to facilitate judicial economy. *See, e.g., Griffin*, 377 U.S. at 226-27; *Foman*, 371 U.S. at 181-82.

The Court granted plaintiffs' Motion for Leave to File Supplemental Complaint on December 12, 1988. New Mexico did not object to plaintiffs' motion in its response, which also requested leave to file a supplemental answer. However, that latter request was not formally before the Court at the time; by the accompanying motion, New Mexico now brings this request to the Court's attention. The allegations raised in the Supplemental Complaint require response by New Mexico and raise the need for New Mexico to state a supplemental affirmative defense.

The third and fourth sentences of paragraph 1 of the Supplemental Complaint alter the meaning of the Complaint. The Complaint, in paragraph 9, defines the limitation in Article IV(b) of the Canadian River Compact (Compact) as providing "that the amount of conservation storage in New Mexico, or reservoir storage capacity available for impounding those waters [i.e., all waters originating in the drainage basin of the Canadian River in New Mexico below Conchas Dam], cannot exceed an aggregate total capacity of two hundred thousand (200,000) acre-feet." Paragraph 12 of the Complaint similarly defines the limitation in Article IV(b). The thrust of the Complaint is that any storage capacity available for impounding waters originating below Conchas Dam in excess of 200,000 acre-feet is in violation of Article IV(b). The third and fourth sentences of paragraph 1 of the Supplemental Complaint depart from the Complaint by alleging that reservoir capacity in place below Conchas Dam in excess of 200,000 acre-feet is in violation of Article IV(b), regardless of whether the reser-

voirs store water originating above or below Conchas Dam. In its Supplemental Answer, New Mexico denies that New Mexico has exceeded in any way the limitation of Article IV(b) of the Compact, which limits conservation storage available for impounding water originating in the drainage basin of the Canadian River below Conchas Dam in New Mexico, not the location or design capacity of storage facilities. Article IV(a) of the Compact gives New Mexico free and unrestricted use of all waters originating above Conchas Dam.

Paragraph 2 of the Supplemental Complaint contains entirely new allegations not found in the Complaint and dealing with matters in factual dispute between the parties. Paragraphs 3, 4, and 5 of the Supplemental Complaint also contain new allegations to which New Mexico has not yet had an opportunity to respond.

Plaintiffs were granted leave to file their Complaint against New Mexico on October 5, 1987. In the Complaint, the cause of action went to excess reservoir capacity. The Complaint contained no request for specific injunctive relief, such as alteration of dam structures to reduce physical storage capacity, or monetary damages for any claimed harm. The Supplemental Complaint asserts harm in that New Mexico is alleged to have stored waters in excess of the Article IV(b) limit in the Compact, thereby depriving plaintiffs of certain waters. This new allegation changes the original cause of action, excess reservoir capacity, by adopting a cause of action based on excess storage of water. The Supplemental Complaint seeks relief in the form of either an injunction against excess storage of water and to require delivery of water withheld or monetary damages, as well as consequential damages. Plaintiffs' Supplemental Complaint alleges asserted wrongs which they could have sued to prevent, but did not, prior to the enlargement

of Ute Dam. Accordingly, New Mexico asserts in its Supplemental Answer a supplemental affirmative defense of laches.

For all the above reasons, New Mexico requests that it be allowed leave to file the accompanying Supplemental Answer.

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January 6, 1989

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October Term, 1988

STATE OF OKLAHOMA and
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v.

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Defendant.

NEW MEXICO'S SUPPLEMENTAL ANSWER

The Court granted plaintiffs' Motion for Leave to File Supplemental Complaint on December 12, 1988. This Supplemental Answer responds to the allegations raided in the Supplemental Complaint and states a supplemental affirmative defense in response to plaintiffs' allegations. New Mexico also reasserts the other defenses stated in its Answer.

1. Paragraph 1 of the Supplemental Complaint discusses plaintiffs' Complaint, and therefore states certain legal conclusions in sentences two and three which require no response. The paragraph is otherwise denied.

2. In response to paragraph 2, New Mexico denies all allegations, except that each of the certain reservoirs in New Mexico to which plaintiffs apparently refer has a storage capacity of 100 acre-feet or less. Consistent with formal actions of the Canadian River Commission, none of the States reports reservoirs with capacities of 100 acre-feet or less to the Commission. New Mexico further states that the amount of storage claimed in parapgraph 2 represents total capacity, not conservation storage capacity, and the total capacity of these reservoirs includes dead storage capacity and deposited sediment, neither of which is conservation storage. More than one-third of that total capacity is stock tanks that are not used for storage of water for subsequent release for any purpose.

3. New Mexico admits the first sentence of paragraph 3. New Mexico denies the allegations in the second and third sentences of paragraph 3.

4. Answering paragraph 4, New Mexico admits the first sentence. As to the second sentence, New Mexico admits that at water surface level 3787.0, the top of the spillway crest, Ute Reservoir could have impounded 246,600 acre-feet of water based on the 1983 sediment survey, but denies the remainder of the sentence. The third sentence is denied. In further response to the third sentence of paragraph 4, New Mexico states that Article IV(b) of the Compact does not limit the amount or place of storage of water arising above Conchas Dam in any manner. Accordingly, New Mexico's storage of water arising above Conchas Dam in reservoirs below Conchas Dam is not wrongful.

5. Answering paragraph 5, New Mexico denies the first sentence. New Mexico admits the second and third sentences, except the phrases "including 209,501 acre-feet of water in conservation storage" and "including 224,701 acre-feet of water in conservation storage," which are denied.

6. New Mexico denies all allegations of paragraph 6. New Mexico denies that its storage of water is or has been in any way wrongful or in violation of the provisions of the Compact. New Mexico denies that its storage of water has damaged plaintiffs by denying to them waters to which they are entitled, or in any other way.

7. New Mexico denies all allegations of paragraph 7.

8. New Mexico denies all allegations of paragraph 8.

SUPPLEMENTAL AFFIRMATIVE DEFENSE

Plaintiffs are barred by laches from seeking affirmative equitable or legal relief against New Mexico in regard to existing dam structures, impoundment of water, or past damages in either water or money, if any.

New Mexico also realleges the affirmative defenses set out in its December 4, 1987 Answer.

WHEREFORE, New Mexico respectfully requests that plaintiffs take nothing and that their Complaint and Supplemental Complaint be dismissed.

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IN THE
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OCTOBER TERM, 1988

STATE OF OKLAHOMA and STATE OF TEXAS,

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STATE OF NEW MEXICO,

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OKLAHOMA AND TEXAS' RESPONSE IN OPPOSITION TO NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

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January 18, 1989

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2. The Supplemental Complaint did not change the original cause of action. 3

3. The Complaint requested sufficient injunctive relief. 4

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Wisconsin Heritages, Inc. v. Harris, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980) 5

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No. 109, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

OKLAHOMA AND TEXAS' RESPONSE IN OPPOSITION TO NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

Oklahoma and Texas (Plaintiffs) hereby respond to New Mexico's Motion for Leave to File Supplemental Answer. New Mexico's motion seeks leave of the Court to file a supplemental answer containing a supplemental affirmative defense of laches. In an attempt to support its motion and thereby raise a new affirmative defense, New Mexico has substantially misstated the allegations in Plaintiffs' Complaint and Supplemental Complaint. Plaintiffs request that, if the Court grants New Mexico leave to file a supplemental answer, it strike New Mexico's untimely affirmative defense.

I.

NEW MEXICO HAS SERIOUSLY MISCHARACTERIZED PLAINTIFFS' COMPLAINT AND SUPPLEMENTAL COMPLAINT

1. *The Supplemental Complaint did not change the allegations in the Complaint regarding the reservoir*

capacity in New Mexico subject to the 200,000 acre-foot limitation in Article IV(b) of the Compact. New Mexico alleges that the third and fourth sentences of paragraph 1 of the Supplemental Complaint alter the meaning of the Complaint "by alleging that reservoir capacity in place below Conchas Dam in excess of 200,000 acre-feet is in violation of Article IV(b), regardless of whether the reservoirs store water originating above or below Conchas Dam." (New Mexico's Memorandum in Support of Motion, pp. 3-4) These sentences, which summarize the allegations in paragraphs 9-12 of the Complaint, do not allege that waters originating above Conchas Dam are subject to the Article IV(b) limitation. Like paragraphs 9-12 of the Complaint, these sentences reflect Plaintiffs' consistent interpretation of the Compact that the Article IV(b) limitation on conservation storage in New Mexico applies to all reservoir storage capacity in the Canadian River basin below Conchas Dam and that all waters entering those reservoirs are "waters which originate in the drainage basin of Canadian River below Conchas Dam" as that phrase is used in the Compact.

New Mexico has long evidenced its understanding of Plaintiffs' interpretation of the Article IV(b) limitation. In its December 4, 1987, Answer to the Complaint, New Mexico disputed the same interpretation which it now contends was raised for the first time in the Supplemental Complaint. Paragraph 9 of New Mexico's Answer to paragraph 9 of the Complaint states, in pertinent part, that

> New Mexico denies that Article IV(b) of the Compact refers to reservoir storage capacity physically in place below Conchas Dam. . . .
>
> The same reservoirs that have a limited capacity available for the storage of waters arising below Conchas Dam may have an additional unlimited capacity for the storage of waters arising above Conchas Dam in the Canadian River basin. The place of origin of water, not the place of its storage, controls.

(New Mexico's Answer, p. 4)

It is disingenuous and untenable for New Mexico to now contend that the Supplemental Complaint in any way alters the meaning of the Complaint concerning New Mexico's violation of Article IV(b) of the Compact. New Mexico fully understood and disputed these allegations in its Answer and no Supplemental Answer is required.

2. *The Supplemental Complaint did not change the original cause of action.* New Mexico contends that the Supplemental Complaint "changes the original cause of action, excess reservoir capacity, by adopting a cause of action based on excess storage of water." (New Mexico's Memorandum in Support of Motion, p. 4) This allegation ignores the distinction between the facts alleged and the cause of action. A cause of action is the unlawful violation of a right which the facts show. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 13 (1951); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927). The Supplemental Complaint merely alleges new facts showing further injury to Plaintiffs as a result of New Mexico's unlawful violations of Plaintiffs' rights as alleged in the Complaint.

The cause of action in the instant case is New Mexico's violation of Article IV(b) of the Compact. The facts alleged in the Complaint were that, as a result of the enlargement of Ute Dam and Reservoir, New Mexico was maintaining conservation storage in excess of the amount allowed by Article IV(b) of the Compact. The facts alleged in the Supplemental Complaint were that, as a result of New Mexico's continuing violation of Article IV(b) of the Compact, New Mexico was impounding water in that excess conservation storage to the injury of the Plaintiffs. The Supplemental Complaint, therefore, does not alter the

cause of action but merely alleges further injury to the Plaintiffs arising from the original cause of action.

3. *The Complaint requested sufficient injunctive relief.* New Mexico further mischaracterizes the Complaint as not requesting specific injunctive relief against the continuation of New Mexico's excess conservation storage. (New Mexico's Memorandum in Support of Motion, p. 4) The Complaint, however, expressly requested that the Court enjoin the Compact violation by New Mexico described therein (maintaining excess conservation storage capacities) and command New Mexico to take such remedial actions as may be necessary to bring it into compliance with the terms of the Compact. (Complaint, p. 10) Such injunctive relief would necessarily include reducing reservoir storage capacities to comply with Compact limits.

The Supplemental Complaint requested, in addition to the relief requested in the Complaint, that the Court enjoin New Mexico to reduce and maintain the waters in conservation storage to not more than the 200,000 acre-feet of conservation storage authorized under Article IV(b) of the Compact and for other appropriate relief. The relief requested in the Supplemental Complaint cannot justify New Mexico's request to file an untimely affirmative defense which actually is directed against the Complaint.

II.

NEW MEXICO'S REQUEST TO FILE AN AFFIRMATIVE DEFENSE OF LACHES IS UNTIMELY

New Mexico's motion for leave to file a new affirmative defense of laches is based upon mischaracterizations of the Complaint and Supplemental Complaint as discussed

above. These misrepresentations are contrary to the plain language of the Complaint and Supplemental Complaint. Their purpose is to provide some justification for New Mexico's failure to timely this affirmative defense.

Any defense of laches could and should have been made in New Mexico's Answer to the Complaint. New Mexico claims that the Supplemental Complaint alleges wrongs which Plaintiffs could have sued to prevent prior to the enlargement of Ute Dam, and that Plaintiffs should be barred by laches from any "relief against New Mexico in regard to existing dam structures, impoundment of water, or past damages in either water or money, if any." (New Mexico's Memorandum in Support, pp. 4-5)

As stated above, the Complaint sought injunctive relief against New Mexico's existing dam structures after the enlargement of Ute Dam and Reservoir created excess conservation storage in violation of the Compact. The impoundment of water and resultant damages alleged in the Supplemental Complaint are direct consequences of New Mexico's maintaining the excess conservation storage alleged in the Complaint. It is simply too late for New Mexico to raise laches as an affirmative defense to the Complaint.

It is one of the essentials of the principle of waiver of a defense that if one knows of the defense, it must be seasonably pleaded. *Bernard v. U.S. Aircoach, et al.*, 117 F.Supp. 134, 137-138 (S.D. Cal. 1953). If the moving party is guilty of inexcusable delay or laches, the supplemental pleading will not be permitted. *Wisconsin Heritages, Inc. v. Harris*, 490 F.Supp. 1334, 1338 (E.D. Wis. 1980).

New Mexico has not shown any justification for its failure to raise laches as an affirmative defense to the Complaint. It is attempting to use the Supplemental Complaint as a means to inject into the litigation a new defense which is not based on events occurring after the filing of

the Complaint, but which will burden and complicate the proceedings to the prejudice of Plaintiffs. In doing so, New Mexico has substantially misrepresented both the Complaint and the Supplemental Complaint.

CONCLUSION

Pursuant to Fed. R. Civ. P. 15(d) and Sup. Ct. R. 9.2, it is within the Court's discretion to grant New Mexico's Motion for Leave to File Supplemental Answer if the Court deems it advisable. New Mexico has not shown any good basis for the Court to grant its motion. The Court, by its Order dated December 12, 1988, may have already determined that a Supplemental Answer was not advisable.

WHEREFORE, Plaintiffs request that if the Court grants New Mexico's Motion for Leave to File Supplemental Answer, it strike New Mexico's untimely affirmative defense.

Respectfully submitted,

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October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S REPLY ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

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IN THE

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S REPLY ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

New Mexico replies to plaintiffs' response to New Mexico's Motion for Leave to File Supplemental Answer. Plaintiffs' response is based on an incomplete and misleading characterization of the initial pleadings and other proceedings in this case. This reply corrects and clarifies the record concerning preliminary proceedings and otherwise replies to plaintiffs' arguments. To do so, this reply will refer to informal conferences held before the Special Master, although the parties were not bound by discussions in those meetings. *See, e.g.*, Tr. at 15 (Feb. 26, 1988).

Immediately upon learning at a pre-trial conference before the Special Master that plaintiffs construed their Complaint so broadly as to provide for such drastic remedies as alteration of dam structures in New Mexico to reduce storage capacities, New Mexico raised the need to amend its Answer to include an additional affirmative defense of laches. Tr. at 71-72, 78, 111, 113 (Feb. 26, 1988). Until then, New Mexico had not reasonably been put on notice of plaintiffs' intent. *See id.* at 78. New Mexico had reasonably inferred from the Complaint that, notwithstanding the plaintiffs' allegations concerning excess reservoir capacity, an order from the Court requiring New Mexico to enforce existing or modified operating criteria for Ute Dam in compliance with the Canadian River Compact would have been sufficient to satisfy plaintiffs' original prayer for relief. Plaintiffs later requested leave to file a Supplemental Complaint with the Court, raising certain allegations of which they had become aware, and to which New Mexico intended to respond. Motion for Leave to File Supplemental Complaint and Supplemental Complaint, Nov. 18, 1988; *see* Tr. at 25-26 (Aug. 23, 1988); Tr. at 89-91 (Nov. 3, 1988). Plaintiffs' Motion for Leave to File Supplemental Complaint was allowed by the Court on December 12, 1988.

The Supplemental Complaint included specific damage claims and prayers for relief. These new allegations made clear for the first time in formal pleadings that the plaintiffs were seeking something more than a simple Court order instructing New Mexico to refrain from violating the Compact. Accordingly, New Mexico has moved for leave to respond to the allegations in its Supplemental Answer, and has included the laches defense. The Supplemental Answer was New Mexico's first opportunity to plead laches after having been put on notice of the necessity of pleading it. Therefore, the laches defense is timely, and, in any case, plaintiffs have not been prejudiced.

Laches is an affirmative defense under Fed. R. Civ. P. 8(c). Affirmative defenses, though not initially pleaded, are not waived where, despite a technical failure to follow the rule, the matter is raised in the trial court in a manner which does not prejudice the plaintiff. *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983); *see Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980).

Finally, even if the Court were to find some merit in plaintiffs' objection to New Mexico's assertion of laches, this Court has counseled in the past that an original action "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy," in that "[a] State is superior to the forms it may require of its citizens." *Virginia v. West Virginia*, 220 U.S. 1, 27-28 (1911).

CONCLUSION

For all the above reasons, New Mexico's Motion for Leave to File Supplemental Answer should be granted.

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October Term, 1990

States of Oklahoma and Texas,

Plaintiffs,

v.

State of New Mexico,

Defendant.

Jerome C. Muys, *Special Master*

REPORT

October 15, 1990

BEST AVAILABLE COPY

In Memoriam

During the course of these proceedings the western water community lost two of its giants, Charles J. ("Charlie") Meyers and Stephen E. ("Steve") Reynolds. At the time of his death in 1988, Charlie Meyers was serving as Special Master in *Texas v. New Mexico*, No. 65 Original, a dispute over the Pecos River Compact. He had enjoyed a long and distinguished career as a law professor at Texas, Columbia and Stanford, from which he retired as dean in 1981, and later in private practice, where he continued to distinguish himself in the natural resources field. The undersigned first met Charlie when he was serving as law clerk to Special Master Simon H. Rifkind in *Arizona v. California*, No. 8 Original, in the late 1950's and we remained friends since that time.

Steve Reynolds' death this year capped a 35-year career as New Mexico's State Engineer, where he played a powerful and respected role in western water policy. He was active in the present proceedings and displayed his well known flair and wit right up until his final illness.

The West of Sam Foss' poetry sought "men to match my mountains." Charlie and Steve were such men, and I doubt that we shall see their likes again.

Jerome C. Muys

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Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H. Doc. No. 319, 90th Cong., 2d Sess. (1968)	10,68

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Frankfurter and Landis, *The Compact Clause - A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925)	27,28
Hobbs & Raley, *Water Quality v. Water Quantity: A Delicate Balance*, 34 Rocky Mt. Min. L. Inst. 24-1 (1988)	27
Muys, *Interstate Water Compacts* (1971) (National Technical Information Service, No. PB202 998)	26,28
Muys, *Quality v. Quantity: The Federal Water Pollution Control Act's Quiet Revolution in Western Water Rights Administration*, 23 Rocky Mt. Min. L. Inst. 1013 (1977)	26
Report of Special Master Simon H. Rifkind, No. 8 Original (December 5, 1960)	51
Saunders, *Reflections on Sixty Years of Water Law Practice*, Univ. of Colo. School of Law, Resource Law Notes, No. 18 (September 1989)	26
Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 Nat. Res. J. 565 (1989)	27
Simms, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mt. Min. L. Inst. 23-1 (1988)	26,28
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I. SUMMARY OF THE CONTROVERSY

The Canadian River is an interstate river system which rises along the boundary between southeastern Colorado and northeastern New Mexico. From its headwaters the Canadian River flows south, then generally from west to east through New Mexico and the Texas Panhandle into Oklahoma, where it flows into the Arkansas River, a tributary of the Mississippi. The North Canadian River, a major tributary of the Canadian River, rises in northeastern New Mexico and flows eastward through the Texas Panhandle into Oklahoma, where it joins the Canadian River before it flows into the Arkansas River. (App. No. 1).

In 1949 the proposed Congressional authorization of the Canadian River reclamation project in Texas triggered demands by New Mexico for a compact to allocate the waters of the Canadian River System among New Mexico, Texas and Oklahoma. The three States entered into the Canadian River Compact in 1950, which was ratified by them in 1951 and consented to by Congress in 1952. (App. No. 2).

The Compact made certain allocations of the use of the Canadian River System among the three States and established limitations on "conservation storage" by New Mexico and Texas. Ute Dam was constructed by New Mexico on the mainstream of the Canadian River in 1963 and enlarged in 1984. As a result of the 1984 enlargement Texas and Oklahoma claimed that New Mexico was violating the conservation storage limitation imposed on that State by the Compact. Limited discussions among the States proved fruitless and Texas and Oklahoma initiated this action in April 1987.

II. PROCEDURAL HISTORY IN THIS COURT

Texas and Oklahoma filed a Motion for Leave to File Complaint, Complaint, and Brief in Support on April 16, 1987. New Mexico filed its Brief in Opposition on June 25, 1987. The Court granted the motion on October 5, 1987 and New Mexico filed its answer to the complaint on December 4, 1987. The Court appointed the undersigned as Special Master on January 19, 1988.

The Special Master and the State representatives met in Phoenix, Arizona on February 26, 1988 for an organizational conference. On March 2, 1988 the Special Master issued Pre-trial Order No. 1 which provided for the filing of (1) a joint statement of material facts as to which there was no dispute, (2) separate or joint statements of material facts which appeared to be in dispute, and (3) separate or joint statements of the legal issues. The order directed informal exchange of documents and prohibited initiation of formal discovery without permission of the Special Master.

By letter dated April 8, 1988 the Land and Natural Resources Division of the United States Department of Justice responded to the Special Master's letter of March 2, 1988 and informed him that the United States would not seek to intervene in the case.

The required documents were filed on July 1, 1988. Another conference was then held in Denver, Colorado on August 23, 1988 for the purpose of determining the status of the States' efforts to arrive at a joint statement of agreed material facts and list of stipulated documents, the possible need for an evidentiary hearing, and the filing of amended pleadings.[1]

On October 25, 1988 the States filed a preliminary Joint Statement of Facts, Joint Statement of Agreed Facts, Joint Statement of Disputed/Under Discussion Facts, and Joint Statement of Legal Issues. The Special Master met with the States in Santa Fe, New Mexico on November 3, 1988 for the purpose of coordinating the submittal of final statements of agreed facts, further narrowing areas of factual dispute and agreeing on a schedule for filing cross-motions for summary judgment on the legal issues. All parties agreed that the proceedings initially be confined to resolution of the question of whether New Mexico has violated the Compact and that consideration of issues pertaining to any appropriate relief for any violation that might be found be deferred until after that determination.

On December 1, 1988 the Special Master issued Pre-trial Order No. 2, which provided for the States to file (1) simultaneous motions for summary judgment on the legal issues raised by the pleadings and (2) a joint statement of facts, annotated to lists of exhibits considered to be material and relevant to the

[1] On August 29, 1988, after discussions among the parties at the Phoenix and Denver conferences, the plaintiffs filed with the Special Master a Motion for Leave to File a Supplemental Complaint and Supplemental Complaint, which the Special Master filed with the Court on November 18, 1988. New Mexico did not oppose the motion, but requested that it be permitted to file a supplemental answer if the motion was granted. The Court, by order dated December 12, 1988, granted the plaintiffs' motion. New Mexico filed a Motion for Leave to File a Supplemental Answer and Supplemental Answer, which the Court granted by order dated February 21, 1989.

legal issues and as to which there is no genuine dispute. Provision was made for subsequent evidentiary objections and requests for discovery.

After those filings were made the States met with the Special Master in Denver, Colorado on April 11, 1989 to resolve any evidentiary issues, discuss discovery requests and schedule further proceedings. Discovery was completed on May 26, 1989. Responses to the cross motions for summary judgment were filed on June 19, 1989. Specifications of material facts as to which the States believed a genuine dispute existed and remaining evidentiary objections were filed on July 10, 1989. No further proceedings were held for the next several months because of conflicting proceedings in *Texas v. New Mexico*, No. 65 Original, the Pecos River Compact litigation, in which counsel for Texas and New Mexico in this case were also involved.

On September 13, 1989 the States met with the Special Master in Oklahoma City, Oklahoma to consider outstanding evidentiary objections and methods by which disputes over material facts could be resolved. At that meeting it was agreed that the disputed issues could be resolved without the necessity for trial. It was also agreed that reply briefs would be filed, with particular emphasis on matters on which the Special Master requested additional briefing.

Reply briefs were filed by the States on October 27, 1989. Six hours of oral argument were held on November 1, 1989 in Dallas, Texas. The Special Master circulated a Draft Report on March 23, 1990. Written comments on the Draft Report were submitted by the States on May 29, 1990 and the parties

filed replies on June 15, 1990. Seven hours of oral argument were heard on June 19, 1990 in Denver.

The record developed pursuant to the foregoing procedures consists of an agreed statement of 100 material facts as to which there is no dispute ("Agreed Material Facts"), 365 exhibits, 135 pages of pleadings, 422 pages of briefs, 498 pages of transcript of meetings, 566 pages of depositions and 433 pages of transcript of oral argument.

III. BACKGROUND OF THE DISPUTE

A. Pre-Compact Development on the Canadian River System

(1) New Mexico

The earliest uses of the Canadian River in New Mexico were along the Vermejo River and other upstream tributaries to the mainstream of the Canadian River in the vicinity of Raton. (N.M. Ex. 45C, pp. 5-6). In 1936 Congress authorized the construction of Conchas Dam on the mainstream of the Canadian River about 30 miles northwest of Tucumcari, New Mexico and the dam was completed by the Corps of Engineers in 1939. (N.M. Ex. 61, p. 4). In 1938, Congress authorized construction of the Tucumcari Project under the federal reclamation laws. (Act of April 9, 1938, 52 Stat. 211). Project construction was initiated in 1940 and completed in 1950. (N.M. Ex. 61, p. 5a; Agreed Material Fact B.4). The project was designed to irrigate some 42,500 acres of land and to satisfy the municipal and industrial needs of the City of Tucumcari. The project lands are located about 30 miles southeast of Conchas Dam and are served by the Conchas Canal which diverts water from Conchas Reservoir. (N.M. Ex. 61, p. 3 and maps, App. No. 1). There were approximately 10,000 acres of potentially irrigable lands scattered along the lower reaches of various tributaries to the mainstream of the Canadian River below Conchas Dam in New Mexico in 1950. (P. Ex. 109, p. 1).

Little, if any, uses had been made of the waters of the North Canadian River. (P. Ex. 36, p. 1).

(2) Texas

In 1949, the Panhandle area of Texas which is traversed by the Canadian River sustained some 1,250,000

acres of irrigated agriculture based on wells which tapped the vast Ogallala groundwater aquifer. The municipal and industrial requirements of the 280,000 residents of eleven cities in the region were also served by groundwater. There were no diversions of surface flows of the Canadian River for any purposes, primarily because of its erratic and wasting nature. (P. Ex. 99, pp. 5-7).

No significant uses had been made of the waters of the North Canadian River.

(3) Oklahoma

Oklahoma had made extensive use of the North Canadian River, but had made no use of the Canadian, although it had plans to do so. (P. Ex. 109, pp. 1-2).

B. Congressional Authorization of the Canadian River (Sanford) Reclamation Project, Texas

Studies of the water development potential of the Canadian River below Conchas Dam were initiated by the Bureau of Reclamation ("Bureau") in 1947 and resulted in a June 1949 report on a plan for development for the Canadian River Basin in Texas. It proposed the construction of a multiple-purpose project near Sanford, Texas,[2] whose principal purpose would be to serve the municipal and industrial requirements of eleven cities in the region. (N.M. Ex. 57, pp. 1, 14). Legislation to authorize the project, H.R. 3482, was introduced by Representative Eugene

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[2] Because of its proximity to Sanford, Texas, the Canadian River Project came to be known as the Sanford Project, which is how it is referred to in this Report. More recently it is sometimes referred to as the Lake Meredith Project.

Worley of Texas early in 1949 in the 81st Congress, along with H.R. 2733 authorizing the States to enter into a compact to apportion the waters of the Canadian River.

The Bureau's June 1949 report recommended that a compact allocating the waters of the Canadian River Basin among New Mexico, Texas and Oklahoma be entered into prior to initiation of project construction. Moreover, the New Mexico Congressional delegation opposed authorization of the Sanford Project until such a compact was in place. After H.R. 2733 passed the House in August 1949, it was held up by the New Mexico senators until a compromise amendment was adopted prohibiting the appropriation of funds for construction of the project until a compact had been ratified by the States and consented to by Congress. (P. Ex. 34). In the meantime, H.R. 3482 was enacted as Pub. L. 81-491 on April 29, 1950 (64 Stat. 93, 43 U.S.C. §600c note) and the Canadian River Compact was negotiated and signed by the State compact commissioners on December 6, 1950. On December 29, 1950, the Sanford Project authorization bill was enacted (64 Stat. 1124, 43 U.S.C. §§600b and c), section 2(b) of which provided (43 U.S.C. §600c(b)):

> Actual construction of the project herein authorized shall not be commenced, and no construction contract awarded therefor, until (1) the Congress shall have consented to the interstate compact between the States of New Mexico, Oklahoma, and Texas agreed upon by the Canadian River Compact Commission at Santa Fe, New Mexico, December 6, 1950 in conformity with Public Law 491, Eighty-first Congress. . . .

The required Congressional consent was granted May 17, 1952. (66 Stat. 74). Construction of Sanford Dam was completed in 1964, creating Lake Meredith Reservoir with a total capacity of 1,408,000 acre-feet. (P. Ex. 105, p. 1). The Sanford Project is operated by the Canadian River Municipal Water Authority ("CRMWA"), a Texas agency. The maximum amount of water ever impounded in Lake Meredith was 546,100 acre-feet in 1973. On August 19, 1988 the reservoir contained 360,700 acre-feet of water. (P. Ex. 93). The CRMWA is authorized to divert 100,000 acre-feet per annum for municipal purposes and 51,200 acre-feet for industrial purposes. (Agreed Material Fact C.24). Maximum annual diversions for those purposes were 80,652 acre-feet in 1980, of which 72,304 acre-feet were used for municipal purposes and 4,996 acre-feet were used for industrial purposes, while transmission losses accounted for 3,352 acre-feet. (P. Ex. 139). The population of the eleven cities served by the project is approximately 460,000. (P. Ex. 138).

C. The Negotiation of the Canadian River Compact, Ratification by the States, and Congressional Consent

In anticipation of the passage of the legislation granting consent to enter into a compact and authorizing the Sanford Project, and in response to the Bureau's June 1949 report, the three States appointed representatives in the Fall of 1949 to negotiate a Canadian River compact.[3] These representatives first

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[3] Agreed Material Fact D.4. In 1926 an entirely different group of state representatives from New Mexico, Texas, Oklahoma and Arkansas negotiated a compact regarding control of the flood

met informally in February 1950. (P. Ex. 149). As required by the consent legislation passed a few months later, Mr. Berkeley Johnson, District Engineer for the United States Geological Survey in Santa Fe, New Mexico, was appointed federal representative to the Canadian River Compact Commission ("CRCC") by President Truman on May 26, 1950. (P. Ex. 11). Mr. Johnson, who had served the same function on the Pecos River Compact Commission two years earlier, appointed Mr. Raymond Hill, a prominent Los Angeles, California consulting engineer, as his engineering advisor.

The first official meeting of the CRCC was in Santa Fe, New Mexico on June 30, 1950. (P. Ex. 96A). At that meeting each State made a short statement as to what it hoped to obtain from a compact. Raymond Hill was named Chairman of an Engineering Advisory Committee composed of the engineering advisors to each Commissioner ("Engineer Advisors"). The Engineer Advisors were instructed to review matters which had been suggested for study by Texas Commissioner Spence in a memorandum submitted to the Oklahoma and New Mexico commissioners after the informal meeting in February, to make suggestions

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waters of the Canadian River. The 1926 compact was signed and ratified by each state except Arkansas, which abstained, but the Texas legislature's ratification was vetoed by the Texas governor, rendering the agreement ineffective. Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H. Doc. No. 319, 90th Cong., 2d Sess. 45 (1968). Because the 1926 compact is so far removed from the 1950 compact at issue here in time and focus, it is of no relevance to resolution of the issues presented by this case.

for additional data or studies that would be necessary or useful in developing a compact, and to initiate such studies. The Engineer Advisors met immediately following the June 30, 1950 CRCC meeting to consider existing hydrological and other technical data and whether there was any need to compile additional data. (*Id.* at 6).

The second official meeting of the CRCC was held in Ardmore, Oklahoma on October 11-12, 1950. (P. Ex. 96B). Raymond Hill presented a formula based on future storage limitations in each State which the Engineer Advisors believed would be an appropriate basis for a compact. He stressed that the principles suggested were quite simple and their effect on river operations could easily be tested. The recommended formulas were approved in principle by each Commissioner, and the Engineer Advisors were directed to report to the CRCC by December 15, 1950 on the effect of the formulas on the availability of water to each State. The Commission directed a Legal Committee ("Legal Advisors") to draft a compact implementing the Engineer Advisors' proposal and to submit it to the Commission by December 15, 1950 for consideration at the next official meeting of the Commission which was set for December 18, 1950. (*Id.* at 3). The Engineer Advisors prepared a draft compact dated October 11, 1950 which Raymond Hill forwarded to the Legal Advisors with a covering memorandum dated October 13, 1950. A partial draft compact dated November 14, 1950 was prepared by the Texas Legal Advisor in coordination with the other Legal Advisors and Raymond Hill and forwarded to the Engineer Advisors with the explanation that the Legal Advisors had not been able "to sat-

isfactorily word those articles of the Compact dealing with restrictions upon storage." (N.M. Ex. 30, p. 1).

The third meeting of the CRCC was advanced from December 15 to December 4-6, and Texas Commissioner Spence expressed his desire to have a compact signed by December 6 so that the Sanford Project authorization bill could go forward. (P. Exs. 18 and 21). The CRCC met in Santa Fe, New Mexico on December 4, at which time the Engineer Advisors made revisions to the earlier storage limitation formulas. Raymond Hill was directed to work with the Legal Advisors to revise the draft compact in accordance with the Engineer Advisors' revised formulas. That group prepared a draft compact on December 5, which was revised and presented to the Commission on December 6 at 11:15 A.M. and, after some revision, signed by them at 1 P.M. (P. Ex. 96C). Chairman Johnson later reported that "[t]he compact reached the signing stage at the third meeting which certainly constituted a record." (P. Ex. 110, p. 1).

By letter dated January 17, 1951, Chairman Johnson requested Raymond Hill to prepare a "written statement of your explanation of the various articles of the compact . . . ". (P. Ex. 140). Hill prepared such a memorandum entitled "Development of Final Wording of Compact" and dated January 29, 1951 (N.M. Ex. 30, p. 1) ("Hill Memorandum"), which was approved by the CRCC at its fourth and final meeting on January 31, 1951 as being consistent with what transpired at all meetings and in the discussions of the CRCC. The CRCC also found that the final draft of the Compact carried out such interpretation and expressed the view of the CRCC. (P. Ex. 96D).

In addition to the Hill Memorandum, the only records of the Compact negotiations produced by the States consist of rather cryptic minutes of the four official meetings, certain hydrologic data utilized by the Engineer Advisors, three reports by the Texas Engineer Advisor to his superiors on the work of the Engineering Advisory Committee, and a few scattered pieces of correspondence among the engineers, lawyers and commissioners.

The Compact was ratified by New Mexico on February 7, 1951 (*see* N.M. St.Ann. §75-34-3 (1985 Repl. Vol.)), Oklahoma on March 22, 1951 (*see* 82 Okl. St.Ann. §526.1 (1970 ed.)), and Texas on May 10, 1951 (*see* V.T.C.A. Water Code §43.001-006 (1988)). Congress consented to the Compact by the Act of May 17, 1952. (66 Stat. 74).

D. Operations of the Canadian River Commission

Article IX of the Compact created an "interstate administrative agency" designated the Canadian River Commission ("Commission"). Its membership is composed of three commissioners, one from each State, and an additional commissioner representing the United States, who is the non-voting presiding officer of the Commission. All members of the Commission must be present to constitute a quorum and a unanimous vote of all three State commissioners is required for "all actions taken by the Commission". (Art. IX(a)).

The Commission is authorized to employ necessary personnel "for the performance of its functions under this Compact" and to enter into contracts with federal agencies for the collection and presentation of relevant data and reports. (Art. IX(c)(1) and (2)). It

also has a broad grant of authority to "[p]erform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies." (Art. IX(c)(3)).

The Commission is mandated to maintain necessary water measurement facilities, to make an annual report to the governor of each State, and to make information available to the governors of the three States and appropriate federal representatives.

The organizational meeting of the Commission was held in Clayton, New Mexico on April 23, 1954. (P. Ex. 97A). From 1955 to 1962 the Commission conducted annual meetings which became increasingly shorter in duration. Except for 1965, when a regular meeting was held, the Commission's annual meetings from 1963 to 1970 consisted of telephone conference calls, some of which were only ten minutes in length. (P. Exs. 97K-97R). Beginning in 1971 the Commission resumed convening for its annual meeting. (P. Ex. 97S). No formal committees were established until 1971, when a Budget Committee was appointed (*id.*), but a budget was not established for Commission operations until 1978, and it has ranged from $900 to $1500 annually since that time. (P. Exs. 97W, 97BB).

The content of the annual meeting has generally been a presentation by each State of Canadian River water resource development matters of possible interest to the other States. The water storage information required by Article VIII of the Compact has usually been presented by the Engineering Committee, which was officially formed and given this charge in 1974. (P. Ex. 97T, p. 5). Its first inventory of

reservoir storage capacity in each State was submitted to the Commission in 1977 and has been updated annually. (P. Exs. 95O-U).

E. Genesis of the Controversy

The Compact limitations on New Mexico's use of the Canadian River and North Canadian River are set out in Article IV, as follows:

> (a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.
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> (b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.
>
> (c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

After some site investigations in the mid 1950's, the New Mexico Interstate Stream Commission ("NMISC") selected a site one mile west of Logan, New Mexico on the mainstream of the Canadian River about 45 miles below Conchas Dam for the construc-

tion of Ute Dam and Reservoir.[4] (P. Ex. 50). Beginning in 1957, the New Mexico legislature authorized the NMISC to issue special revenue bonds to finance construction of the project. (P. Ex. 47). In February 1957 the NMISC filed a Notice of Intention to appropriate and store 200,000 acre-feet of water below Conchas Dam. It subsequently filed an application for a permit to appropriate and store water for the project in February 1960, which was approved in 1962. (P. Ex. 50).

Construction of Ute Dam was completed in April 1963. The initial reservoir capacity was 109,600 acre-feet and the structure was built to accommodate an enlargement of the reservoir to a total capacity of 272,000 acre-feet by the installation of spillway gates. (P. Ex. 97L, p. 2). The New Mexico legislature subsequently authorized the enlargement of the dam in 1978. When adequate funding was finally authorized, construction began in 1982 and the enlargement was completed in 1984. Its enlarged capacity is 272,800 feet, and its water surface area at spillway crest has been more than doubled from 3,821 acres to 7,947 acres. (P. Ex. 78; Agreed Material Facts E.8, E.11). As of 1984 Ute Reservoir's capacity to store water was 246,617 acre-feet, the remaining capacity being occupied by sediment. (Agreed Material Fact E.10). Sediment deposition in the reservoir averaged 1,246 acre-feet per year for the period 1963-1983 inclusive,

[4] Twenty-fifth Biennial Report of the State Engineer of New Mexico for the 49th & 50th Fiscal Years (July 1, 1960 to June 30, 1962). The Interstate Stream Commission is charged with protecting New Mexico's interest in interstate streams and protecting, developing and conserving all waters of the State. *See* N.M. St.Ann. §§72-14-1 through 72-14-3, 75-2-4 (1978).

the period for which actual data are available, and annual sediment deposition is expected to continue at that level. (Agreed Material Fact E.21). Consequently, *if* that average annual rate of sediment deposition has continued, the estimated sediment in the reservoir has increased by about 8,700 acre-feet since 1984, making the estimated actual maximum water storage in the reservoir on May 16, 1987, when it spilled, about 241,700 acre-feet and the current storage capacity about 237,900 acre-feet.[5] No storage space is currently allocated to or used for either flood control or power production.

When New Mexico decided to build Ute Dam in 1957 and so informed the Commission at its annual meeting in 1958 (P. Ex. 97F, p. 2), the announcement engendered no apparent concern on the part of Texas and Oklahoma, presumably because the projected initial capacity of the project was only 109,600 acre-feet, well within Article IV(b)'s 200,000 acre-foot limitation on conservation storage. (P. Ex. 97L, p. 2). The fact that Ute Dam was constructed so that spillway gates could be installed to increase its capacity to 272,000 acre-feet was apparently first communi-

[5] Maximum actual water storage on May 16, 1987 *probably* did not equal the maximum 1984 capacity of 246,617, as Agreed Material Fact F.14 states, but an amount closer to 241,633 acre-feet (246,617 minus 4,984) to allow for four additional years of sediment deposition. It is emphasized that the States are only in agreement as to *actual* sediment deposition through 1983, the date of the last United States Geological Survey study. Any estimates of subsequent sediment deposition referenced in this Report are solely those of the Special Master to illustrate the *probable* present situation and will necessarily be subject to verification or modification by agreement of the parties or actual survey in any subsequent phases of this proceeding.

cated to the Commission by the New Mexico Commissioner at the annual meeting in 1964, but the Commission had previously been advised that, although New Mexico was investigating constructing up to 350,000 acre feet of capacity below Conchas Dam, it would be subject to the 200,000 acre-foot conservation storage limitation. (P. Ex. 97H, p. 2).

Similarly, perhaps because total reservoir capacity in New Mexico below Conchas Dam at the time was also well below the 200,000 acre-foot limitation, the Memorandum of Agreement between NMISC and the New Mexico Department of Fish and Game in 1962 obligating the NMISC to maintain a 50,000 acre-foot minimum recreation pool did not appear to generate concern in the downstream States,[6] although the issues of whether water stored or capacity allocated solely for recreational use or water stored in unused sediment control capacity constituted "conservation storage" under the Compact had surfaced as early as 1953 and 1955, respectively, but had not been resolved. (P. Exs. 42-44, 97I). The recreation issue was raised obliquely again in 1977 in connection with a Commission-directed inventory of all reservoirs with a capacity in excess of 100 acre-feet. At that time it was decided not to include reservoirs storing water solely for recreational purposes in the inventory, but, again, the issue of whether such storage was chargeable as conservation storage was not directly addressed and resolved. (*See infra* pp. 104-05).

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[6] P. Ex. 52. The existence of this agreement was first communicated to the Commission by the New Mexico Commissioner during the telephone conference call meeting of March 2, 1964. P. Ex. 97L, p. 2.

It was not until 1982, when the New Mexico legislature authorized funding of modifications to Ute Dam to increase the capacity of Ute Reservoir to 272,000 acre-feet and the NMISC contracted with the Bureau of Reclamation to design and oversee the additional construction, that Texas and Oklahoma formally expressed their concern that the planned enlargement might violate the Article IV(b) limitation.

At its regular meeting on March 31, 1982, New Mexico Commissioner Reynolds told the Commission that legislation had recently been passed authorizing additional funding for construction at Ute Dam and Reservoir over and above the amount authorized in 1978. New Mexico reported further that a contract had been entered into with the Bureau of Reclamation for the preparation of specifications, which would probably be completed in June, 1982, and the supervision of construction. (P. Ex. 97Z).

By letter dated July 28, 1982, Oklahoma informed New Mexico that, based on what it understood at that time, the proposed enlargement of Ute Dam and Reservoir would result in a violation of the Compact and suggested the initiation of discussions of the Oklahoma concerns (P. Ex. 71, pp. 2-3):

> It is for this reason that we wish to bring this matter to your attention and initiate discussions on the issue prior to New Mexico's actual commencement of construction and expenditure of substantial funds. Just as it is in the best interest of all to insure adherence to the provisions of the Compact, it is equally in the best interest of all, particularly New Mexico, that great amounts of time, energy

> and expense not be incurred for nought. We believe that you might concur that prudence dictates that we proceed as expeditiously as possible to entertain and resolve, if at all possible, this matter and that to the fullest extent possible, the risk of your state's not receiving the expected returns from its investment be minimized.

New Mexico responded that Ute Dam and Reservoir, as enlarged, would not, in New Mexico's opinion, violate the Compact and that New Mexico would be proceeding accordingly. (P. Ex. 73).

A special meeting of the Commission was held on September 29, 1982 at which there was a lengthy discussion of the proposed enlargement and the Oklahoma and Texas concerns that it would result in violation of the Compact. (P. Ex. 98E). At that point, bids for the construction work had been submitted but not yet accepted. (*Id.* at 97). Near the conclusion of the meeting, when it was apparent that no immediate resolution was possible, New Mexico was asked if it would at least agree to delay, for a reasonable period of time, further action until the Commission could attempt to resolve the issues presented by the proposed enlargement. New Mexico stated that it felt it must proceed despite the outstanding problems. (*Id.* at 96-98).

On October 18, 1982, Texas Commissioner Lemon informed New Mexico Commissioner Reynolds that, although Texas did not desire to stop or slow down the enlargement of Ute Dam and Reservoir, Texas was concerned that New Mexico's reservoir storage capacity below Conchas Dam exceeded 200,000 acre-feet. He stated further that (P. Ex. 74):

> Texas is gravely concerned with any theory that the compact does not restrict New Mexico in the reservoir capacity that your state could build. This, I should think, would be obvious because under such a theory New Mexico could construct a million acre-foot reservoir at the Texas-New Mexico state line so long as New Mexico would denominate 200,000 acre-feet of capacity as dedicated to conservation storage. In my judgment, such a proposition destroys the fundamental basis of the compact.

Commissioner Reynolds replied that New Mexico would adopt operating criteria to limit the amount of water in conservation storage to stay within the Compact limitation. (P. Ex. 75).

At its next regular annual meeting on April 14, 1983 the Commission, in further attempts to address and resolve the Ute enlargement issues, directed its Legal Committee to research certain questions and report back to the Commission. (P. Ex. 98F, pp. 56-62). Oklahoma and Texas submitted their positions at the Commission meeting of March 6, 1984, but New Mexico did not submit a report. (P. Ex. 98G, pp. 37-41).

On May 14, 1984 the NMISC adopted operating criteria for Ute Reservoir, which established a sediment control pool at elevation 3741.6 feet, which is the top of the recreation pool established in 1962 (*supra* p. 18) and set the conservation storage capacity of Ute Reservoir at 197,700 acre-feet. (P. Ex. 81). At the 1985 regular meeting, Texas Commissioner Sims stated his view that (1) any beneficial use

of storage should be chargeable as conservation storage unless the Commission specifically exempted such use and (2) the enlargement of Ute Dam and Reservoir, New Mexico's subsequent operating criteria notwithstanding, violated the Compact. (P. Ex. 98H, pp. 24-25). Oklahoma concurred with Texas' position, and New Mexico indicated that its present position was the same as expressed in 1984. (*Id.* at 26-27).

At the regular Commission meeting of March 12, 1986, the Texas Commissioner made the following motion (P. Ex. 98I, p. 51):

> That the Canadian River Commission, after having studied the Ute Dam enlargement and other potential for storage of water in excess of quantities allowed under Article IV of the Canadian River Compact, finds that the allocation of storage capacity for any use not specifically exempt from the Compact constitutes conservation storage under the Compact unless expressly determined otherwise by the Commission.

The motion was seconded by the Oklahoma Commissioner, but New Mexico voted "no", thus precluding the unanimity for Commission action required by the Compact.

The instant litigation was filed April 16, 1987.

The New Mexico claim that water stored in Ute Reservoir which had originated above Conchas Dam is not chargeable against the 200,000 acre-foot limitation in Article IV(b) was not laid before the Commission until almost a year after this litigation was initiated.

IV. ISSUES PRESENTED AND SUMMARY OF RECOMMENDATIONS

Texas and Oklahoma claim that, as of the completion of the enlargement of Ute Dam and Reservoir in 1984, New Mexico has been in knowing and willful violation of Article IV(b) of the Compact, which provides that "the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet." (Complaint at ¶12, Supp. Complaint at ¶1). As set forth in the complaint and refined throughout these proceedings, the claimed violation is based on plaintiffs' contentions that (1) Article IV(b) imposes a limit of 200,000 acre-feet on the constructed reservoir capacity physically available for conservation storage, not the volume of stored water, (2) if the Article IV(b) limitation applies to stored water, waters originating above Conchas Dam which either (a) spill over Conchas Dam or (b) constitute seepage or return flow from the Tucumcari Project and which reach the mainstream of the Canadian River below Conchas Dam and are captured by Ute Reservoir are "waters which originate . . . below Conchas Dam" within the meaning of Article IV(b) and are chargeable against its limitation on actual stored water, (3) whether the Article IV(b) limitation applies to physical reservoir capacity or actual stored water, the capacity allocated to or water actually stored in the "desilting pool" portion of the Ute Reservoir "sediment control pool" established by New Mexico's 1984 Operating Criteria is not "solely" for sediment control and is therefore not exempted from the 200,000 acre-foot limitation on "conservation storage" as defined by Article II(d)

of the Compact, and (4) the desilting pool should be viewed as solely or predominantly for recreational purposes and its capacity or actual storage charged against the 200,000 acre-foot "conservation storage" limitation.

New Mexico disputes all four of the plaintiffs' contentions and further asserts that the plaintiffs are barred by the doctrine of laches from seeking relief for damages alleged to have been caused by the enlargement of Ute Dam because they could and should have filed suit at an earlier date.

The four referenced issues are discussed below seriatim and recommended for disposition based on the preponderance of the evidence[7] as follows:

(1) Article IV(b) imposes a limitation on stored water, not physical reservoir capacity. This recommendation renders New Mexico's laches argument moot.

(2) Waters originating in the Canadian River Basin above Conchas Dam, but reaching the mainstream of the Canadian River below Conchas Dam as a result of spills or releases from Conchas Dam or seepage and return flow from the Tucumcari Project, are subject to the Article IV(b) limitation.

(3) The water stored in the dead storage portion of the Ute Reservoir "sediment control pool" is not chargeable against the Article IV(b) limitation. The issue of whether and to what extent the remaining water in the pool, which has been designated a "de-

[7] Because this is not an equitable apportionment case, a "clear and convincing" burden of persuasion was not imposed on the plaintiffs. *See infra* pp. 86-88.

silting/minimum recreation pool" should be exempt from chargeability under Article IV(b) because it serves a "sediment control" purpose is referred to the Canadian River Commission for good faith negotiations and possible resolution. This referral is without prejudice to the ability of the States to later seek to invoke this Court's jurisdiction if the issue cannot be resolved within one year.

(4) The water stored in the Ute Reservoir desilting/minimum recreational pool cannot be viewed as solely for recreation, under either the Compact or New Mexico law. The same is true of the water stored in a small 400 acre-foot capacity reservoir in the State which, while it serves primarily recreation and fish and wildlife purposes, is also used for domestic stockwatering purposes. (P. Ex. 89; Agreed Material Fact F.3). Hence, the issue of whether water stored for the sole purpose of *in situ* recreational use at these two reservoirs in the Canadian River Basin in New Mexico constitutes conservation storage does not present a justiciable controversy. However, water stored in Clayton Lake and Hittson reservoirs, with a combined capacity of 4,100 acre-feet, under permits for storage solely for recreation and fish and wildlife purposes, is chargeable as conservation storage.

(5) If the foregoing recommendations are approved, New Mexico will have been in violation of Article IV(b) of the Compact since the Spring of 1987, and this matter should be returned to the Special Master for determination of any injury to Texas and Oklahoma and recommendations for appropriate relief.

V. THE DUTY OF STATES TO NEGOTIATE IN GOOD FAITH ON COMPACT CONTROVERSIES

This controversy is before this Court in large measure because the Canadian River Commission failed to deal with several compact interpretation issues in a constructive, cooperative manner, a situation with which this Court is all too familiar with respect to the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. 554 (1983) and 482 U.S. 124 (1987). Because issues arising under a number of the almost two dozen other water allocation compacts appear likely to be presented to this Court for resolution in the future under similar circumstances,[8] it is appropriate that the Court set forth in this case the nature and scope of the legal obligations of compact parties to attempt to resolve compact interpretation issues and the limitations that the Court intends to impose on the invocation of its jurisdiction to resolve such disputes in the future.[9]

The Compact Clause of the Constitution (Art. I, sec. 10, cl. 3) was designed to permit the states to continue to deal with certain interstate matters on a cooperative basis, as had been the practice in the colonies and among the states under the Articles of Confederation.[10] The requirement of Congressional consent to compacts dealing with regional matters affected with a national interest was intended to enable Congress to review the compact plan for its adequacy in protecting the federal interest in the subject matter. In essence, the framers of the Constitution were willing to allow the states to address regional problems that would otherwise be subject to the preemptive legislative power of Congress if Congress was satisfied that the national interest was adequately protected. Not only would this enable regional prob-

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[8] For example, it is common knowledge that the negotiation of the Colorado River Compact of 1922 was based on water supply data which provided a reasonable basis for assuming the availability of about 17.5 million acre-feet per annum available for allocation among the Colorado River Basin States. However, water supply data over the past 65 years show that a more realistic amount is about 13.5 million acre-feet. Consequently, some have called for an original action in this Court by the Upper Basin States to void the Compact for mutual mistake of fact. *See, e.g.*, Saunders, *Reflections on Sixty Years of Water Law Practice*, Univ. of Colo. School of Law, Resource Law Notes, No. 18 (September 1989) 7,9-10. *See also* Simms, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mt. Min. L. Inst. 23-1, 23-24 through 23-27 (1988); Muys, *Interstate Water Compacts*, 375, 390-92 (1971) (National Technical Information Service, No. PB202 998). Others suggest that federal environmental control legislation of the past 25 years, particularly in the water quality field, may have superseded earlier compact consent legislation and rendered the approved allocations illusory. *See* Bloom, *The Effects of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms - Can the Environmental Protection Agency Amend an Interstate Compact?*, 22 Rocky Mt. Min. L. Inst. 917 (1976); Muys, *Quality v. Quantity: The Federal Water Pollution Control Act's Quiet Revolution in Western Water Rights Administration*, 23 Rocky Mt. Min. L. Inst. 1013 (1977); Hobbs & Raley, *Water Quality v. Water Quantity: A Delicate Balance*, 34 Rocky Mt. Min. L. Inst. 24-1 (1988); *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

[9] *Cf. Colorado v. New Mexico*, 459 U.S. 176 (1982) and 467 U.S. 310 (1984), where the Court appeared to refine the burden of proof which a plaintiff state must satisfy in an equitable apportionment action. *Compare* Tarlock, *The Law of Equitable Apportionment Revised, Updated and Restated*, 56 U. Colo. L. Rev. 381 (1985) *with* Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 Nat. Res. J. 565 (1989).

[10] Frankfurter and Landis, *The Compact Clause - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 691-95 (1925).

lems to be resolved closer to home in a manner tailored to a region's peculiar circumstances,[11] but it would obviate the need for Congress to deal with such problems and forestall the states from invoking this Court's original jurisdiction in interstate disputes. The framers obviously recognized, as this Court has repeatedly advised the states which have invoked its original jurisdiction,[12] that interstate water disputes are far more amenable to solution by negotiation and agreement than by litigation.

For compacts to fulfill their intended role, it is obviously essential that the participant states enter into and implement such agreements with good faith intentions to make them work. Relatively few compacts are self executing, and the more recent ones often provide for the establishment of an interstate administrative agency, usually characterized as a "commission", to implement or enforce the compact program, as was provided for by Article IX of the Canadian River Compact at issue here. Thus, of the 21 water allocation compacts currently in effect, 11 of them provide for the establishment of a compact commission to administer the compact.[13] Since such commissions are designed to implement a compact's basic objectives, they serve a role similar to federal and state administrative agencies or executive departments in implementing legislative programs. Thus,

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[11] *Virginia v. Tennessee*, 148 U.S. 503, 517-20 (1893); Frankfurter and Landis, n. 10 *supra*. at 694-95.

[12] *Texas v. New Mexico*, 462 U.S. 554, 575-76 (1983).

[13] Simms, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mt. Min. L. Inst. 23-1, 23-3 (1988); Muys, *Interstate Water Compacts*, 12-13 (1971) (N.T.I.S., No. PB202 998).

within the general framework of a compact and its stated objectives, a compact commission clearly has the authority to interpret or clarify provisions of the compact and, to the extent not inconsistent with the basic purposes of the compact, fill in the interstices of the compact plan.[14] This is a particularly important function of compact commissions because almost all water compacts are designed to remain operative indefinitely until the participants mutually agree to alter or terminate them or Congress exercises the power it almost uniformly retains in its consent legislation to alter, amend or revoke its consent, as it did in its consent to the Canadian River Compact.[15] However, Congress rarely, if ever, has conducted oversight hearings on the status of water allocation and/or management programs under the many water compacts it has approved, let alone altered, amended or revoked its consent to any of them. Consequently, unless Congress abandons its traditional benign neglect of interstate water issues now covered by existing compacts, the resolution of known and latent problems under existing compacts presented by the passage of time, such as the recognition of reserved water rights for federally reserved lands, particularly Indian reservations, better hydrologic data, revision of predicted hydrologic patterns because of significant atmospheric changes, unanticipated agricultural, ur-

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[14] This authority is analogous to the power of a federal agency to adopt rules and policy which fill in gaps left in the Congressional delegation of authority to the agency. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844-45 (1984).

[15] Section 2 of the Act of May 17, 1952, provides that "the right to alter, amend, or repeal Section 1 of this Act is expressly reserved." 66 Stat. 74, 78.

ban or environmental needs, development of new uses of water, shifting values of established uses, subsequent federal legislation impliedly superseding earlier consent statutes, etc., will have to be resolved by negotiation among the compact parties, presumably within the framework of the existing compact commissions, or by litigation in this Court.

A significant problem in this regard is that most of the compacts require unanimous agreement by the members of the compact commission on any issue of compact interpretation or implementation, as does the Canadian River Compact. This enables a single state, for whatever reason, to frustrate commission action. In water allocation compacts, it gives particular leverage to an upstream state alleged to be in violation of a compact to "stonewall" negotiations in the commission forum, since by virtue of its geographical advantage it may have already stored or used the volumes which may be in dispute. This necessarily drives its compact partners to seek to invoke this Court's jurisdiction for relief, an expensive and time consuming burden on the parties as well as on this Court's calendar. This clearly is not the result Congress intends when it grants its consent to a compact.

Consequently, it seems timely for this Court to declare that when states enter into a compact they undertake an implied commitment to make the compact work and to take no affirmative or dilatory action that would frustrate its purpose. This is the rule under general commercial contract law[16] and would seem

[16] *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984); Restatement (Second) of Contracts §205 (1979); 4 *Corbin on Contracts* § 947 (1951 and Supp. 1971).

particularly applicable to political agreements among sovereign states.

More significantly, once the states reach agreement and seek the requisite Congressional consent to the regional program, it seems clear that any resulting Congressional consent also imposes an implied duty on the part of the compacting states to participate in good faith in the implementation of the compact plan to carry out its purposes. Such an implication is eminently reasonable, otherwise the compact program to which Congress has consented and thereby deferred direct legislative action might fail, all to the detriment of the national interest. Less obvious implied Congressional actions have been declared by this Court. *Arizona v. California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 438 U.S. 696 (1978) (impliedly reserved federal water rights).

The implied commitment includes the duty to negotiate in good faith with the other states, either in the compact commission forum or otherwise, to address such matters as ambiguities or uncertainties in compact meanings, significant factual or legal assumptions underlying the compact which the passage of time has proven to be erroneous, technological and social developments that affect the original compact purposes, matters which are relevant to the compact purposes but which are not expressly addressed in the compact, technical issues subject to reasonable differences of view, and the like.[17] Such good faith

[17] Although state representatives on compact commissions might often lack recognized expertise in water resources development matters, they are usually well supported by able legal and technical staff, as on the Canadian River Commission.

negotiations should be a condition to invoking the Court's jurisdiction to resolve any irreconcilable disputes and would serve a function analogous to the doctrine of primary jurisdiction.[18] Such a requirement is a reasonable exercise of this Court's often exercised power to limit the use of its original jurisdiction.[19] In any event, such negotiations should be required as a condition to the Court's exercise of its original jurisdiction even if there were not an implied duty to do so stemming from Congressional consent legislation. If such negotiations should demonstrate to the parties the need to renegotiate the Compact, that result would be an added benefit to all concerned.

The foregoing duty could be enforced by requiring the attorney general of any state seeking to invoke the Court's jurisdiction over a compact dispute or answering such a complaint to certify that the state

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[18] 4 Davis *Admin. Law* §22:1 *et seq* (1983 ed.). This policy differs from the proposal advanced by New Mexico and rejected by the Court in *Texas v. New Mexico*, 462 U.S. 554, 566-71 (1983), which would have limited the Court's role in compact disputes to determining whether final decisions by a compact commission were arbitrary and capricious. As the Court aptly observed, this might have enabled either Texas or New Mexico, by casting a negative vote on the Pecos River Compact Commission, to prevent a decision and thereby preclude review of the compact dispute by this Court.

The procedure recommended herein simply would require a compact commission, as a condition to any member state invoking this Court's jurisdiction, to address an issue in good faith and to develop a thorough record for review, even if the unanimous agreement of the commission required by the compact cannot be achieved. This Court reserves its prerogative to resolve the dispute if the states are unable to do so.

[19] *See Texas v. New Mexico*, 462 U.S. at 570-71.

has negotiated in good faith in an attempt to resolve the dispute. Based on such certification, the Court's order accepting the complaint would provide that its decision would be based on the administrative record developed before a compact commission or other informal negotiating body, absent good cause shown to adduce additional evidence.[20] The Court should also consider whether or to what extent legal arguments that were not presented to those entities would be entertained, *i.e.*, should it apply a rule analogous to that generally applied to judicial review of federal administrative agency decisions. 4 Davis *Admin. Law* §26:7 (1983 ed.); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). If the Court should subsequently conclude after review of the administrative record that a state had not negotiated in good faith, it might utilize appropriate sanctions against that state, such as resolving any close disputed factual issues against it or assessing it a larger share or all of the costs of the litigation.

The issues presented in the present controversy should be viewed against the commitments undertaken by the States in entering into the Canadian River Compact and the record of their consideration by the Canadian River Commission. Article I of the Compact states that two of its "major purposes" are "to promote interstate comity [and] to remove causes of present and future controversy." Such a represen-

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[20] In most cases the record would undoubtedly be informally compiled, as is the case with respect to "informal adjudications" by the Secretary of the Interior and other federal land and water agencies. In situations where important disputed issues of material fact might arise, a compact agency might find it necessary to develop a more formal hearing record.

tation by the States to each other and to the Congress reinforces the propriety of the implied duty to negotiate disputed issues in good faith. Unfortunately, the record in this proceeding, in the view of the Special Master, does not show that adequate, meaningful negotiations took place before the Commission with respect to the four issues that have been the focus of this litigation. However, since the policy recommended above is for the Court's consideration for future interstate compact disputes, I have proposed final disposition of three of the four issues presented and recommended that the fourth, primarily because of its technical, fact-specific nature, be remanded to the Canadian River Commission with directions to enter into a good faith effort to develop a meaningful record on the issue and resolve the dispute, leaving open the opportunity to ask this Court to decide the issue if the remanded proceedings prove fruitless after one year.

VI. ARTICLE IV(b)'S LIMITATION ON "CONSERVATION STORAGE" IN NEW MEXICO SHOULD BE INTERPRETED TO APPLY TO WATER IN STORAGE, NOT THE PHYSICAL CAPACITY OF RESERVOIRS

Article IV(b) of the Compact provides as follows (emphasis added):

> New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that *the amount of conservation storage* in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam *shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.*

Article II(d) defines "conservation storage" as follows (emphasis added):

> The term "conservation storage" means *that portion of the capacity of reservoirs available for the storage of water* for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, *and it excludes any portion of the capacity of reservoirs* allocated solely to flood control, power production and sediment control, or any of them.

Texas and Oklahoma contend that Article IV(b)'s limitation on "conservation storage" in New Mexico below Conchas Dam restricts the aggregate size of reservoirs that may be constructed for conservation storage purposes. New Mexico asserts that the limitation applies only to the water actually stored in its

reservoirs. Thus, although the physical capacity of Ute Reservoir and other smaller reservoirs in the Canadian River drainage basin below Conchas Dam is now about 245,000 acre-feet, New Mexico contends that it is not in violation of the Compact unless the amount of water actually stored for conservation storage purposes in those reservoirs exceeds 200,000 acre-feet. This report recommends that the New Mexico interpretation be sustained.

Texas and Oklahoma assert that the literal reading of the Article IV(b) limitation in conjunction with the definition of conservation storage in Article II(d) makes it clear that the Article IV(b) limitation is a restriction on the size of physical facilities "available" for impounding waters for conservation storage purposes. However, although the literal language of those two articles would support that claim, other provisions of the Compact, as well as the history of the Compact negotiations, compel the conclusion that the Article IV(b) restriction was intended to apply to stored water, not reservoir capacity.

New Mexico also argues that the Texas and Oklahoma claim should be barred by the doctrine of laches because those two States did not initiate this litigation until after Ute Dam had been enlarged, even though they had known of New Mexico's general intentions to do so for many years and its specific intention to do so since 1982. Because this report recommends rejection of plaintiffs' interpretation of Article IV(b), it is unnecessary to address the merits of New Mexico's laches argument. However, the Special Master is constrained to observe that New Mexico would bear a very heavy burden to demonstrate laches on the part of Texas and Oklahoma because they sought to

resolve their concerns with the enlargement of Ute Dam by negotiations within the Commission rather than immediately seeking to invoke the Court's original jurisdiction, negotiations in which New Mexico appears to have been a reluctant participant. (*See supra* Chapter V).

The basis for the recommended resolution of the "stored water" or "reservoir capacity" issue starts with the purposes of the Compact expressed in Article I, two of which were "to make secure and protect present developments within the States" and "to provide for the construction of additional works for the conservation of the waters of Canadian River". The means chosen was to protect all existing uses and to impose appropriate limitations on future storage and use of Canadian River System waters so that a reasonable amount of water would flow to the downstream states for their future use. (N.M. Exs. 30 (pp. 3-4); 64). This meant that storage limitations were needed on New Mexico, which is at the headwaters of the river system, for the benefit of Texas and Oklahoma, and on Texas for the benefit of Oklahoma. However, no limitation was imposed on Oklahoma because it was assumed that none of its uses could adversely affect the two upstream states. (N.M. Ex. 30, p. 4; P. Ex. 33).

The restrictions on New Mexico and Texas contained in Articles IV and V, respectively, are a study in contrasts. Article IV(b) is a short, cryptic section literally keyed to "conservation storage", which Article II(d) defines in terms of reservoir capacity. However, Article IV(c) briefly specifies the "conservation storage" limitation on the North Canadian River in New Mexico in terms of "storage of such water",

which plainly refers to "stored water", not reservoir capacity.[21]

Article V is a long, somewhat complicated statement of a formula for determining the ceiling on the amount of water that Texas may actually impound at any one time. There is no indication anywhere in the Compact that the limitations within New Mexico or on the two States were to be qualitatively different. Indeed, other provisions of the Compact make it clear that the limitations were all to be treated as limitations on stored water, not reservoir capacity. First, Article VII provides that the "Commission may permit *New Mexico to impound more water than the amount set forth in Article IV* and may permit Texas to impound more water than the amount set forth in Article V" (emphasis added), treating both articles as limitations on water actually impounded. If Article IV(b) were a reservoir capacity limitation there would never be any capacity available for New Mexico to impound surplus waters on a short term basis with Commission permission, thus making Article VII meaningless as far as New Mexico is concerned.[22]

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[21] Texas' and Oklahoma's contention that this article simply specifies what kind of water may be stored in available conservation storage capacity should be rejected. If conservation storage means capacity, the article would limit the size of the reservoirs on the North Canadian River in New Mexico to the amount of unappropriated water in New Mexico and Oklahoma, an essentially unknown quantity at worst and a moving target at best. But if conservation storage means stored water, then New Mexico can simply store all unappropriated water, whatever its amount.

[22] Texas and Oklahoma suggest that New Mexico could temporarily store any surplus waters in exempt capacity allocated

Second, Article VIII requires that "[e]ach State shall furnish to the Commission at intervals designated by the Commission accurate records of the *quantities of water stored in reservoirs* pertinent to the administration of this Compact". (Emphasis added). If New Mexico's limitation were a capacity limitation, it would only have been required to submit data on the capacities of its reservoirs, not actual stored water.

Therefore, looking solely to the face of the Compact, nothing justifies treating the New Mexico "conservation storage" limitation differently from the Texas stored water limitation, and other provisions of the Compact treat both limitations as ceilings on stored water, not reservoir capacity. There is no apparent reason why Texas and Oklahoma would have wanted to restrict New Mexico from constructing any size reservoir or reservoirs it wished, or why New Mexico would have agreed to do so, as long as it did not store and withhold from Texas and Oklahoma an amount of water greater than the limits specified in the Compact. Indeed, within accepted economic and environmental constraints, it promotes Article I's stated goal of "conservation" of the waters of the Canadian River to permit New Mexico to construct as large a reservoir as is appropriate for a site in order to capture and regulate as much of the river's flood flows as possible, which flows otherwise might be wasted and not conserved for beneficial use. Adherence to Compact limitations could be achieved by

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to flood control or power production. However, Ute Reservoir has no capacity allocated to either of those purposes and, even if it did, it might defeat the project purposes to use that capacity for purposes other than those for which it was designed.

operating criteria, as New Mexico has attempted to do. Of course, whether such criteria are in compliance with the Compact cannot be a matter solely for New Mexico's determination, which has been a principal area of disagreement in the present controversy.

But under the plaintiffs' contention, New Mexico would have been faced with only two options: (1) construct exactly 200,000 acre-feet of reservoir capacity which would be reduced annually by the accumulation of sediment and require New Mexico to periodically enlarge its existing reservoir or reservoirs, hardly an attractive or sensible course of action; or (2) construct enough capacity to accommodate 200,000 acre-feet of conservation storage plus enough additional capacity to capture estimated sediment over the life of the project. Under the latter alternative, Texas and Oklahoma might not permit New Mexico to store water in the unused capacity dedicated to sediment accumulation, even though water would necessarily flow to that area of the reservoir, except on a temporary annual basis with the consent of Texas and Oklahoma. (*See infra* pp. 97-98).

The recommended interpretation of Article IV(b) is reinforced by the negotiating history of the Compact, to which it is appropriate to look for the reasons detailed in Chapter VIIB *infra*.[23] That history provides not the slightest hint that the limitations on

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[23] In addition, the conflicts between Articles IV, VII and VIII resulting from a literal reading of Articles IV(b) and II (d) produce the kind of "absurd result" which this Court has always found to be justification for resort to the legislative history of a statute. *Public Citizen v. United States Dep't of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2566 (1989); *Id.* at 2574 (Kennedy J., dissenting).

Texas and New Mexico should be treated differently. From the earliest drafts of the Compact, the limitations on Texas and New Mexico were uniformly in terms of stored water, even though the definition of conservation storage was literally in terms of reservoir capacity. (N.M. Ex. 30, Ex. A). However, there was no conflict between the two articles because "conservation storage" was only used in the formulas for the stored water limitations on New Mexico and Texas, which were initially measured in part by the capacity of reservoirs in Texas and Oklahoma, respectively, available to store and release water for specified beneficial uses. (*Id.*).

The New Mexico and Texas limitations remained tied to stored water in Raymond Hill's memorandum of October 13, 1950 to the Legal Advisors (*id.*, Ex. B) and in the Legal Advisors' draft compact prepared in response to that memorandum. (*Id.*, Ex. C). However, the compact draft prepared on December 5, 1950 at the CRCC meeting restructured the limitation on New Mexico, without explanation, to restate the limitation in terms of "storage capacity", while the Texas limitation remained keyed to stored water. (*Id.*, Ex. F, p. 2). In the final version of the Compact, approved the next day, the Article IV limitation was revised again to delete the reference to "storage capacity", leaving the restriction tied to conservation storage.

Although the limitation on New Mexico was undergoing revision right up until the morning the Compact was finalized because of the decision to remove any restriction on New Mexico's use of water above Conchas Dam (*see infra* Chapter VII) and its final version did not retain language expressly keyed to stored water as earlier versions had, there is noth-

ing to suggest that the final "conservation storage" language was intended to accomplish the significant change that Texas and Oklahoma infer, particularly in light of the deletion of the reference to "storage capacity" from the December 5, 1950 draft. Had there been such an intent, it surely would have been highlighted in the Hill Memorandum. Rather, Hill was silent on this matter, simply noting that the Engineer Advisors had "originally proposed that the restrictions upon storage of all other waters of Canadian River should be similar in nature to the limitations suggested in the case of Texas" (N.M. Ex. 30, p. 3) and then explaining how the wording of Article IV evolved. Although he spoke in terms of physical construction of works to impound waters below Conchas Dam, he did not suggest that New Mexico's limitation would be in terms of reservoir capacity rather than actual stored water.

Likewise, one would have expected such a significant change, which would have primarily benefitted Texas, to have been discussed in the report of Texas Engineer Advisor Stevens to his superiors on the effect of the final Compact on Texas' interests (P. Ex. 36), but it wasn't. Indeed, Stevens characterized the limitations on both Texas and New Mexico in terms of "conservation storage", even though the Texas limitation in Article V plainly spoke only in terms of "stored water". (*Id.* at 3). Similarly, the final report of CRCC Chairman Berkeley Johnson on the Compact (P. Ex. 33) characterized both the New Mexico and Texas limitations on a parity, as limitations on "conservation storage *capacity*", even though the Article V limitation on Texas clearly is in terms of stored water. It seems clear that Stevens and Johnson, like

most of the other Compact negotiators,[24] were loosely using "stored water" and "storage" interchangeably with "conservation storage capacity", even though the Article II(d) definition of conservation storage speaks only in terms of capacity.

Texas and Oklahoma suggest that a capacity limitation may have been imposed on New Mexico because of its alleged ease of administration, *i.e.*, a one-time measurement of aggregate reservoir capacity allocated to conservation storage rather than measurement of actual volumes in storage at any particular time. Although ease of administration was clearly a goal of the Compact negotiators, there is nothing in the history of the negotiation of the Compact to support this thesis. Nor is there any apparent basis for assuming that it is easier to measure reservoir capacity than volumes of water between various reservoir elevations, or that initial reservoir capacity

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[24] For example, in describing the effect of the limitations in Article IV of the Compact, Raymond Hill used the phrases "storage of all other waters" and "storage of any of the waters", both of which refer to the physical act of storing water, as well as the phrase "a reasonable amount of storage to impound the flood flows", which plainly refers to storage *capacity*. N.M. Ex. 30, p. 3.

Similarly, New Mexico State Engineer John H. Bliss, in informing Senator Clinton Anderson that "total storage *capacity* . . . shall not exceed 200,000 acre-feet", explained that there were no restrictions "on the use of the *waters so stored.*" P. Ex. 28 (emphasis added). Later, after reporting to New Mexico Governor Mabry that "total *storage* of *waters* . . . shall not exceed 200,000 acre-feet", he estimated that "storage *capacity* for all projects which may be feasible below Conchas were probably not equal to the 200,000 acre foot *storage limit.*" P. Ex. 30, p.1 (emphasis added).

allocations to specific purposes, such as sediment control, would be static, rather than subject to modification because of changing circumstances.

Against that background, I have concluded that the Compact negotiators intended to place limits on the amount of water actually stored by Texas and New Mexico and that the lack of consistency in the wording of Articles IV and V is simply careless draftsmanship resulting from (1) the forced march which produced the Compact in record time and (2) the fact that the Compact appears to have been drafted by a committee on which, with all due respect, the Engineer Advisors, rather than the Legal Advisors, appear to have played the dominant role in formulating the language of those articles.

The Compact negotiators plainly concluded that the data on water actually stored that the Commission was directed to collect under Article VIII, including verifiable information as to the classification of the purposes served by various storage volumes,[25] was all the information necessary to enforce the Compact storage restrictions.[26] Texas and Oklahoma have not

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[25] Obviously, the provision of statistics on the total volumes of "water stored" by each State would not provide the information necessary to enforce the limitations on New Mexico and Texas, without further breakdown of the water physically "available for subsequent release" which was stored for the various chargeable beneficial uses or exempt functions specified in the definition of conservation storage in Article II(d).

[26] Although the Commission elected to begin to collect data on reservoir capacities in 1977 in addition to the stored water data *required* by Article VIII, that decision does not compel a different conclusion, especially since such data are collected for all three states, not just New Mexico. (P. Ex. 97V, p. 5).

demonstrated why that overriding, fundamental premise should be ignored even though the final language of Article IV(b) may not reflect that intent as clearly as it might.

VII. WATER WHICH SPILLS OR IS DIRECTLY RELEASED FROM CONCHAS DAM OTHER THAN FOR THE TUCUMCARI PROJECT, AS WELL AS RETURN FLOW AND SEEPAGE FROM THE TUCUMCARI PROJECT, WHICH IS IMPOUNDED BY DOWNSTREAM DAMS IN NEW MEXICO SHOULD BE SUBJECT TO THE ARTICLE IV(b) LIMITATION ON CONSERVATION STORAGE

A. The Issue

Article IV of the Compact specifies New Mexico's rights to use of the Canadian River (IV(a) and (b)) and the North Canadian River (IV(c)). Article IV(a) provides that "New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River *above* Conchas Dam" (emphasis added). Article IV(b) provides that (emphasis added):

> New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters *which originate in the drainage basin of Canadian River below Conchas Dam* shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

Article IV(c) provides as follows:

> The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

On June 23, 1988 Ute Reservoir contained approximately 232,000 acre-feet of stored water (Agreed Material Fact F.12), of which some 180,900 acre-feet is alleged by New Mexico to be flood waters which spilled from Conchas Dam in 1987.[27] These recent Conchas spills have generated what has become the most significant issue in this litigation in terms of the quantity of water in dispute. As an affirmative defense to plaintiffs' claim that it has exceeded the conservation storage limitations of the Compact, New Mexico contends that any water which spills from Conchas Dam, and indeed any irrigation return flow or canal seepage from the Tucumcari Project (located downstream from Conchas Dam and served by a canal from that reservoir), which may be captured downstream at Ute Reservoir (or any other reservoir that might be constructed) is not chargeable against the 200,000 acre-foot conservation storage limitation of Article IV(b). New Mexico's argument rests on a literal reading of Article IV(a), which on its face grants New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Thus, New Mexico asserts that it may impound and use Canadian River waters "originating" above Conchas Dam without restriction anywhere it chooses, including Ute Reservoir, since the conservation storage limitation in Article IV(b) applies only to waters "*which originate* in the drainage basin

[27] N.M. Br. in Opp. to Complaint at App. B. No attempt was made to undertake the challenging review of the hydrologic data, operating assumptions and calculations necessary to verify this claimed amount, the accuracy of which only becomes relevant if New Mexico's claim that such amount is exempt from chargeability under Article IV(b) is sustained.

of Canadian River *below* Conchas Dam" (emphasis added).

Texas and Oklahoma contend that the language of Article IV(a) and (b) cannot bear its literal meaning when read in the context of the Compact purpose and negotiations. They argue that the Compact negotiators intended that possible spills from Conchas Dam would either flow down the mainstream for use in the downstream states or, if intercepted and stored by New Mexico, would be chargeable against the Article IV(b) conservation storage limitation as water "originating" in the Canadian River drainage basin below Conchas Dam.

B. The Propriety of Reviewing the Compact Negotiations to Interpret Article IV

New Mexico invokes the minority view of the parol evidence rule, asserting that, because there allegedly is no ambiguity in the language of Article IV, none of the documentary evidence from the Compact negotiations may be used to contradict its normal meaning. However, the better and majority view endorsed by Corbin and embodied in the Restatement (Second) of Contracts is that contract negotiations and other contemporaneous extrinsic evidence may be utilized to *interpret* a contract term where there is a dispute over its meaning, even though the language on its face may appear unambiguous. Corbin states the rationale for the majority view as follows (3 *Corbin on Contracts* §579 (2d ed. 1960)):

> No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means. . . . Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted. . . .
>
> As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications and other factors that may help decide the issue. Such testimony does not vary or contradict the written words; it determines what cannot be varied or contradicted.

The Corbin view has been incorporated into Section 214 of the Restatement (Second) of Contracts.[28]

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[28] §214. *Evidence of Prior or Contemporaneous Agreements and Negotiations.*

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

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(c) the meaning of the writing, whether or not integrated;

• • •

Comment:

. . . .

b. *Interpretation.* Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of words, and the meaning or meanings of the parties. Even though the words seem on their face to have only a single possible meaning, other meanings often appear when the cir-

This Court has also acknowledged the propriety of such aid in the interpretation of compacts. As Justice Frankfurter emphasized with respect to the compact at issue in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), "[t]hough the circumstances of [a compact's] drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift." That truism applies with particular significance to the Canadian River Compact, which the record shows was *not* drafted "with great care and deliberation."[29]

Indeed, this Court long ago recognized, in the early stages of the dispute between Arizona and California over the meaning of the Colorado River Compact, the need to look to a compact's negotiating history in appropriate circumstances:

> It has often been said that, when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. . . . But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.

Arizona v. California, 292 U.S. 341, 359-60 (1934).

In a subsequent stage of that controversy, the Court interpreted the "statutory compact" between the United States and California provided for in section 4(a) of the Boulder Canyon Project Act (43 U.S.C. §617c) by extensive reliance on the legislative history of that section, agreeing with the conclusion of Special Master Simon H. Rifkind that "the words of Section 4(a), despite their superficial simplicity, cannot bear their literal meaning."[30]

Finally, contrary to New Mexico's contention, this Court's decision in *Texas v. New Mexico*, 462 U.S. 554 (1983), also recognized the propriety of reviewing documentary material from the Pecos River Compact negotiations to interpret that compact. New Mexico argues that the Court's decision supports its view of the proper application of the parol evidence rule, inasmuch as the Court refused to provide for a tie-breaking mechanism in cases of stalemate on the Pecos River Commission because "no court may order relief inconsistent with [a compact's] express terms." (*Id.* at 564). But that statement was made with respect to Article V(a) of the Pecos River Compact, as

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cumstances are disclosed. In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.

[29] Although the Senate committee report on the bill which granted Congressional consent to the Compact stated that it was "the consensus of the Committee that the Compact is an outstanding example of able draftsmanship", S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1952) (N.M. Ex. 29), the Special Master agrees with the contrary assessment of Texas Engineer Advisor Robert M. Whitenton at the Commission's special meeting of September 29, 1982 (P. Ex. 98E) that "this has been a very poorly put together Compact" (*id.* at 105) and that the definition of conservation storage was a "woefully inadequate" one which the authors had "messed up . . . very badly." *Id.* at 106.

[30] Report of Special Master Simon H. Rifkind, No. 8 Original (December 5, 1960) at 170, adopted in *Arizona v. California*, 373 U.S. 546, 564-75 (1963).

to which there was no disagreement between the parties as to its meaning, *i.e.*, that concurrence of both states was required for action by the Commission. Rather, the Special Master and Texas had urged the Court to "reform" Article V(a) under its general equitable powers. Consequently, the parol evidence rule was not implicated in any way in that aspect of the Court's decision. Significantly, however, for purposes of the present controversy, the Court did not hesitate to review the record of the compact negotiations in interpreting Article IV(f), the scope of which *was* in dispute.[31]

Of course, as this Court has repeatedly recognized, a compact is not only a contract but, by virtue of the Congressional consent legislation, a statute as well.[32] Here again, however, the Court has consistently found it appropriate to examine the legislative history of disputed statutory language on a variety of rationales, even when the language in question seemed otherwise clear on its face.[33] Moreover, even those who favor a rather rigid application of the "plain meaning rule" with few exceptions agree that if application of the normal meaning of a statute would produce "patently absurd consequences" or a result that "Congress could not *possibly* have intended", then resort to legislative history is appropriate.[34]

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[31] *Id.* at 569, n. 14. Although the Court stated that Article V(f) "is ambiguous as to the role of the Supreme Court", that statement seems questionable, inasmuch as Article V(f) plainly was directed to "any court".

[32] *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

[33] *Public Citizen v. United States Dep't of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2565-66 (1989).

[34] *Id.* at 2574-75 (Kennedy, J. dissenting) (emphasis in original).

However, it is difficult, if not impossible, to ascertain the legislative context for making such absurdity or intention determinations without at least some minimal examination of the legislative history to determine the broad Congressional purposes against which the consequences of applying the normal meaning of disputed language can be viewed.

With that background, I have concluded that it is necessary and appropriate to examine documentary evidence from the negotiating history of the Canadian River Compact, as well as other contemporaneous extrinsic evidence, to resolve the dispute among the parties over the proper interpretation of Article IV. This conclusion is reinforced by the fact that the haste with which the Compact was negotiated in three relatively short meetings over a five month period because of the felt urgency to reach agreement in order to permit the Sanford Project to go forward obviously led to much less careful draftsmanship than might otherwise have been the case.[35] This is reflected not only on the face of the Compact (*see supra* Chapter VI) but by the fact that the Compact Commission Chairman felt it necessary to have Raymond Hill, his Engineer Advisor and principal architect of the Compact, prepare a memorandum summarizing the evolution of the Compact language to aid in interpretation of the provisions of the Compact. (P. Ex. 140). This unusual step negates any idea that the Commission felt completely comfortable with the wording of the final product. Indeed, the minutes of the fourth and

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[35] Only a few weeks before the Compact was signed the Legal Advisors advised Raymond Hill that they were unable "to satisfactorily word those articles of the Compact dealing with restrictions upon storage." *See supra* pp. 11-12.

final CRCC meeting at which the Hill Memorandum was approved reveal that Bureau of Reclamation representatives at that meeting had questions about a number of its provisions and were directed by Chairman Johnson to discuss their questions with the Engineer Advisors after the meeting. (P. Ex. 96D, p. 2). Similarly, Chairman Johnson's letter to Hill requesting the memorandum contained reference to the following humorous episode shortly after the Compact was signed by the negotiators (P. Ex. 140):

> When at Tulsa recently attending an AWRBIAC meeting, John Bliss [New Mexico's Compact negotiator] had considerable discussion with representatives of the Bureau of Reclamation and the Corps of Engineers. Mr. Baird, lawyer for the Bureau, and Paul Sharkey interpreted the allotment of water to Texas one way; Corps of Engineers' representatives interpreted it another way. John Bliss thought both of them were wrong.

In short, the record of the Compact negotiations and the issues raised in this litigation vividly demonstrate that, as Benjamin Franklin observed, "haste makes waste".

In any event, even if ambiguity were a condition to examining the negotiating history, Article IV(a)'s provision that New Mexico shall have free and unrestricted use of all water originating in the drainage basin of the Canadian River above Conchas Dam is ambiguous on its face in light of the geographical and political realities of the Canadian River Basin. First, one of the major tributaries of the Canadian River is the Vermejo River, an interstate stream which rises

in Colorado and flows into New Mexico.[36] Consequently, reading Article IV(a) literally would give New Mexico free and unrestricted use of *all* waters originating in the Canadian River drainage above Conchas Dam, an interpretation that would have inappropriately prejudged Colorado's claim to an equitable share of those waters which originate in that state.[37] Similarly, a literal, but admittedly absurd, reading would also permit New Mexico to assert its "free and unrestricted" right even after such waters flowed across its borders into Texas and beyond. (Tr. of Dallas Oral Arg., pp. 37-39). At a minimum, then, a necessarily *implied* limitation on the scope of the "plain language" of Article IV(a) is that it applies only to Canadian River waters physically originating above Conchas Dam *within New Mexico*.[38]

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[36] P. Ex. 41, pp. 4-14; *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982).

[37] When the Secretary of the Interior commented on the bill granting the consent of Congress for Oklahoma, Texas and New Mexico to negotiate a compact, he noted that Colorado contained a small portion of the basin within its borders and perhaps should be included. H.R. Rep. No. 542, 81st Cong. 1st Sess. 1 (1949). However, there is no indication that Colorado was ever invited to participate in the negotiations. Perhaps it should have been. *See Colorado v. New Mexico*, 467 U.S. 310 (1984).

[38] The early drafts of the Compact expressly embodied such a territorial limitation. *See infra* pp. 69-74. When the signed Compact was later before Congress for its consent, the report of the Senate Interior and Insular Affairs Committee on the consent legislation implied such a limitation in describing the scope of Article IV(a) as follows: "New Mexico is granted unrestricted use of all waters originating *in that State* above Conchas Dam. . . ." S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1952) (emphasis added).

In its comments on the Special Master's Draft Report, New Mexico argued that Colorado's interest is protected by Article IV(a) because its limitation on New Mexico's exclusive right to use of Canadian River waters originating above Conchas Dam should be interpreted to add the modifying clause "within New Mexico." Even though Article IV(a) is not so expressly limited, New Mexico argues that this omission is cured by Article II(a) of the Compact, which defines "Canadian River" as "the tributary of Arkansas River *which rises in northeastern New Mexico* and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River *and all other tributaries of said Canadian River*" (emphasis added). But although the first italicized phrase appears to have a territorial limitation, the second underscored phrase is not so limited and literally would encompass the Vermejo River and other Canadian River tributaries, such as Chico Rico Creek, which rise in Colorado.

New Mexico also asserts that its exclusive right to *use* waters originating above Conchas Dam should not be read to extend beyond its borders into Texas because Article V provides that "Texas shall have free and unrestricted use of all waters . . . *in* Texas" (emphasis added), which New Mexico suggests gives Texas the exclusive right to *all* waters flowing into Texas from New Mexico, as well as those which originate in Texas. But if this is true, what has happened to Colorado's interest in the Vermejo River and other tributaries rising in that State, whose contributions to the Canadian River System New Mexico argues Article IV(a) was designed to protect from downstream claims?

In summary, New Mexico's *post hoc* rationalization of the literal language of Article IV(a) has no basis in the record and is inconsistent with its interpretation of Article V. The plain fact remains that the language of Article IV(a) requires resort to extrinsic evidence to ascertain its meaning.

Finally, application of the literal language of Article IV to the hydrology of the Canadian River in New Mexico would produce an impact on the water supply available to the Sanford Project in Texas which, while perhaps not "absurd", appears to run counter to the Congressional intention in conditioning funding of the Sanford Project on execution of the Compact and in subsequently approving the Compact. The information that was provided to Congress by the Bureau of Reclamation with respect to the Sanford Project in 1949 showed that its water supply would be drawn primarily from the mainstream of the Canadian River reaching Texas, augmented by tributary flows in Texas between the New Mexico boundary and Sanford Dam. (N.M. Ex. 57, p. 7). Similarly, when the Compact was submitted for Congressional approval in 1951, Congress was informed that it protected the legitimate interests of all three States, including an adequate water supply for the Sanford Project.[39] However, the interpretation of Article IV now advanced by New Mexico would permit that State (1) not only to impound all of the waters of the Canadian River

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[39] P. Exs. 28-29; S. Rep. No. 1192, 82d Cong., 2d Sess. (1952). The Secretary of the Interior's report on the consent bill unequivocally informed the Chairman of the Senate Interior and Insular Affairs Committee that the Compact "will not interfere with operation of the Canadian River project for its intended purposes. . . ." *Id.* at 4.

it could physically capture at Conchas Dam and above, but (2) impound most, if not all of the principal tributary inflow to the main Canadian River in New Mexico at Ute Dam,[40] and (3) build an additional dam or dams on the mainstream below Ute Dam near the Texas state line to impound mainstream waters which have spilled from Conchas Dam or are return flows or seepage from the Tucumcari Project, as well as other minor tributary inflows. Indeed, over the past 25 years the NMISC has filed numerous notices of its intention to apply for permits to appropriate and store all surface waters of the Canadian River below Ute Dam. (Agreed Material Fact E.5). There is absolutely no basis for concluding that Congress intended such a scenario in approving either the Sanford Project or the Compact.

C. The Evolution of Article IV in the Compact Negotiations and its Subsequent Construction by New Mexico and the Bureau of Reclamation do not Support New Mexico's Present Claim that Water in Ute Reservoir Which Originated Above Conchas Dam is not Chargeable as Conservation Storage Under Article IV(b)

Reading Article IV(a) in the context of its evolution in the Compact negotiations and its contemporaneous and subsequent construction, I have concluded that it was only intended to permit New Mexico free and

[40] Although the Sanford Project authorization act provides that "[t]he use by the project of waters arising in Ute and Pajarito Creeks, New Mexico, shall be only such use as does not conflict with use, present or potential, of such waters for beneficial consumptive purposes in New Mexico", 64 Stat. 1124, 43 U.S.C. §600b, the subsequent Congressional approval of the Compact supersedes that earlier limitation.

unrestricted use of waters originating in the Canadian River drainage basin in New Mexico above Conchas Dam (the "upper basin") if such waters are stored, used or diverted for use *at or above Conchas Dam*, including diversions at Conchas Dam for use on the downstream Tucumcari Project. Under Article IV(a) New Mexico may enlarge Conchas Dam or, consistent with other downstream rights in New Mexico, construct or enlarge other upper basin reservoirs to capture flood waters for use by existing or new projects in the upper basin or by the Tucumcari Project. However, waters that cannot be captured by such works and spill or are directly released from Conchas Dam into the mainstream of the Canadian River below Conchas Dam (the "lower basin"), or canal seepage or return flow from irrigation on the Tucumcari Project which reaches the mainstream of the Canadian River,[41] were intended to be treated as waters "originating" in the lower basin and thus subject to the Article IV(b) conservation storage limitation.[42]

[41] The Bureau of Reclamation presumably can take appropriate conservation measures to capture such waters before they reach the mainstream and apply them to other project uses. *See Ide v. United States*, 263 U.S. 497 (1924); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *Bean v. United States*, 163 F.Supp. 838, 845 (Ct. Cl.), *cert. denied*, 358 U.S. 906 (1958).

[42] There may be scenarios in the future in which it would be in the interest of water conservation or sound economics for New Mexico to undertake a program of controlled releases, not spills, from Conchas Dam for storage in Ute Reservoir. The Compact negotiators plainly did not contemplate such a situation, but the Commission clearly could authorize such an arrangement with appropriate conditions to protect Texas' and Oklahoma's interests.

A natural question is why New Mexico should be permitted to capture all water originating above Conchas Dam in New Mexico and put it to use above Conchas and on the downstream Tucumcari Project, but not put it to use elsewhere below Conchas Dam without chargeability under Article IV(b) when the impact on Texas and New Mexico is the same in each case. The short answer is that such was the intent of the Compact framers and was apparently the result of negotiations based on the assessment of probable future development scenarios.

1. The States' Objectives in the Compact Negotiations

New Mexico's consistently stated objectives in the Compact negotiations were (1) to protect its existing uses, almost all of which were on projects upstream of Conchas Dam or on the downstream Tucumcari Project served from Conchas Reservoir, and (2) to retain the right to some reasonable level of development on tributaries to the mainstream of the Canadian River below Conchas Dam, principally Ute and Pajarito Creeks.

Texas sought to set restrictions on New Mexico's future storage of water for consumptive use that would permit a reasonable level of future development in New Mexico below Conchas Dam while permitting adequate flows into Texas for the Sanford Project.

Oklahoma sought flood protection and the opportunity for some future development of the Canadian River for municipal uses.

All States sought to make the Compact as simple as possible to facilitate ease of administration. Consequently, they decided to avoid the kind of complex

formula for restrictions on uses by upstream states contained in the Pecos River Compact which Texas and New Mexico had agreed to two years earlier. Instead, they adopted a scheme that would impose limitations on the amount of future storage of water in New Mexico and Texas for consumptive uses that would deplete the flow to the downstream States. The negotiators all viewed the final Compact as largely self-executing with limitations that could be easily verified and with relatively little need for detailed administrative implementation by the Commission. (P. Exs. 37 (p. 4), 110 (p. 2); N. Mex. Ex. 31, p. 2).

The development of the language in Article IV must be viewed in the foregoing negotiating context.

2. The Negotiators' Treatment of New Mexico's Uses in the Canadian River Drainage Basin Above Conchas Dam

The Engineer Advisors to the Compact Commissioners conducted a number of hydrologic studies of Canadian River water supply and existing and future uses in New Mexico as a basis for developing a limitation on future conservation storage in that State. (P. Exs. 36, 100, 109). Those studies showed that all of the waters in the Canadian River drainage basin in New Mexico above Conchas Dam had been appropriated and developed by works constructed or authorized for construction as of 1950, except for unprecedented spills from Conchas Reservoir in two years (1941 and 1942) of the 1930-50 period used for the studies.

The following general discussion of existing and future development scenarios by New Mexico Compact Commissioner John Bliss and New Mexico Interstate

Stream Commissioner Arch Hurley is summarized in the minutes of the first Canadian River Compact Commission meeting held on June 30, 1950 (P. Ex. 96A, p. 4 (emphasis added)):

> Commissioner Bliss explained that the waters of the upper Canadian above Conchas Reservoir were largely developed. In addition, there are several streams of an intermittent character below the Conchas Reservoir on which there are potential uses—for example, Ute and Pajarito Creeks. He further explained that there is some possibility of improving the seasonal distribution of water supplies in the upper area *without an increase in consumptive use*. Mr. Hurley added that there are 15,000 square miles of drainage area in the Canadian River Basin in New Mexico of which 7300 are above Conchas Reservoir. He stated that a report of the Corps of Engineers showed there were 200,000 acres of irrigated land in the basin within New Mexico; further, that irrigation development on Ute Creek had been under consideration for 25 years or more. Development in that area would depend upon flash floods. Projects on Pajarito Creek will be very expensive but that water may have to be developed as a supplemental source of supply for existing projects. He pointed out that these potentialities as well as the protection of all existing rights in the state must receive the serious consideration of the commission.

The Engineering Advisory Committee refined this assessment several months later during its deliberations on October 10-11, 1950, which were summarized by Texas Engineer Advisor Stevens in a memo to his superiors which stated in part (P. Ex. 109, p. 1 (emphasis added)),

> (c) irrigation in New Mexico consists of approximately 75,000 acres of irrigation above Conchas and 32,000 acres below Conchas—irrigation below Conchas practically all in Tucumcari Project whose works have all been constructed for ultimate development of approximately 42,000 acres; tabulation of irrigation by tributaries will be furnished by New Mexico; paper rights of over 200,000 acres exist;
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> (g) above Conchas, the available water supply has all been put to use—any further development above Conchas would deplete the supply available for Tucumcari Project; *thus future developments would emphasize the better utilization of existing supplies*; . . .

The Engineer Advisors initially proposed a limit of 50,000 acre-feet on additional conservation storage of waters in New Mexico above Conchas, but upon further reflection decided that such a limitation would be meaningless because all of those waters were already "fully developed." The Hill Memorandum explained that decision as follows (N.M. Ex. 30, p. 3):

> The Engineer Advisors originally proposed that the restrictions upon storage of all other waters of Canadian River should be similar in nature to the limitations suggested in the case of Texas. However, it became evident

during the discussions that Texas and Oklahoma both recognized that full development had already been made of all waters of Canadian River originating above Conchas Dam and that accordingly there would be no purpose in placing a limitation upon any increase in the amount of storage of such waters.

Texas Engineer Advisor Stevens explained the change in treatment of the upper basin as follows:[43]

> No restrictions were imposed *as to development above Conchas Dam* because operation studies based on ultimate development of the Tucumcari Project show that [there were] little or no water spills from Conchas Reservoir except during exceptionally wet years similar to 1941 and 1942.

Having thus protected all of New Mexico's existing and authorized uses served by Conchas Dam, primarily the Tucumcari Project, and other projects upstream of that dam, the Engineer Advisors turned to New Mexico's requirements in the Canadian River drainage below Conchas, *i.e.*, the lower basin. Their studies showed that there was an opportunity for additional irrigation development of about 10,000 acres on the lower reaches of Ute and Pajarito Creeks. Starting from that base, and apparently factoring in some estimates of possible future municipal, domestic

[43] P. Ex. 36, p. 3 (emphasis added). Mr. Stevens' view that New Mexico would have unrestricted use of Canadian River waters "above Conchas Dam", not of waters which "originated" above Conchas Dam, is consistent with his earlier recommendation for Compact language to accomplish that result. N.M. Ex. 66.

and industrial uses in the lower basin, the Engineer Advisors concluded that 200,000 acre-feet of annual conservation storage would be sufficient to satisfy New Mexico's reasonably foreseeable future requirements in the lower basin. The Hill Memorandum explained the derivation of that limitation as follows (N.M. Ex. 30, p. 3):

> It was recognized that New Mexico was entitled to provide a reasonable amount of storage to impound the flood flows of Ute Creek and other minor tributaries of Canadian River entering the stream below Conchas Dam and above any contemplated storage works on Canadian River in Texas. It was agreed that a total of 200,000 acre feet would be sufficient to provide regulation of these tributaries and leave a reasonable margin for storage of any of the waters of North Canadian River which might be unappropriated at the time under the laws of New Mexico or of Oklahoma.

The hydrologic studies carried out by the Engineer Advisors assumed alternative development scenarios in attempting to evaluate the impact of (1) no restrictions on future storage at Conchas Dam and above, (2) full development of the Tucumcari Project and (3) future conservation storage of 200,000 acre-feet in the lower basin. Some of those scenarios showed the spills from Conchas Dam as becoming part of the mainstream supply flowing into Texas for use in that State. None of the studies assumed construction of a dam on the mainstream of the Canadian River below Conchas Dam, a development which Texas Engineer Advisor Stevens had regarded as

"unlikely". (P. Ex. 36, p. 3). Nevertheless, the Engineer Advisors did not implement that assumption by recommending that future conservation storage be restricted to the tributaries, and no such restriction was embodied in the Compact.

The most reasonable inference to be drawn from the elimination of any restriction on additional conservation storage in the upper basin because those waters were already "fully developed" is that their free and unrestricted use would be made *at Conchas Dam or above*. Although the negotiators all talked in terms of development at Conchas Dam and above, most of the water stored at Conchas Dam was diverted from the reservoir into the Tucumcari Canal for ultimate beneficial use by the *downstream* Tucumcari Project. Hence, it might not have protected that important project to give New Mexico unrestricted use of the Canadian River only at Conchas Dam *and above*. This realization probably explains why the language in Article IV(a) was changed to relate to waters *originating* above Conchas Dam, thus permitting such waters to be diverted from above Conchas for use below Conchas on the Tucumcari Project in order not to restrict future development of that project. (*See infra* pp. 68-74).

Since any increase in additional storage at Conchas and above was considered highly unlikely, the infrequent spills from Conchas were treated as part of the water supply available for use in the lower basin or, if not captured, for use in Texas. If such spills were captured, however, by a downstream reservoir, an event considered unlikely at the time but which has come to pass with New Mexico's construction of Ute Dam, there is nothing in the negotiating history of

Article IV to suggest that conservation storage of such waters would not be chargeable against the 200,000 acre-foot limitation of Article IV(b). The most that can be said about the Engineer Advisors' treatment of Conchas spills is that they apparently did not project that they would recur with the frequency and magnitude that they subsequently have. However, to conclude, as New Mexico urges, that they are not chargeable at all under Article IV(b) would confer a massive windfall on that State that clearly was not anticipated by the Compact negotiators. In addition, notwithstanding New Mexico's Ute Reservoir Operating Criteria, it would require detailed river routing and reservoir operation studies, as well as arbitrary storage volume classifications, to determine how much of the spills which had "originated" above Conchas was stored in Ute Reservoir (or any other mainstream reservoir) at any particular point in time, a difficult exercise that would be the antithesis of the simplicity of administration that the Compact negotiators sought and thought they had achieved. This task would be further complicated if it were necessary to determine how much of the "above Conchas" water originated in Colorado, to which New Mexico concedes it is not entitled to "free and unrestricted use" under Article IV(a).

In its comments on the Special Master's Draft Report New Mexico argued, for the first time, that the Compact negotiators intended to use Conchas Dam as an intrastate "boundary line" within New Mexico to make the allocations contained in Article IV. It suggests that they intended to follow the pattern of some other compacts existing at the time, particularly the Arkansas and Rio Grande compacts, which use

dams at particular points on those rivers as dividing lines for compact allocations. (N.M. Obj. to Draft Report, pp. 17-19). But even if that contention were so, and there is no mention of any other compacts or an intent to use them as models in the record of the Compact negotiations,[44] it does not advance New Mexico's cause, inasmuch as water originating above or below a specified dam would impliedly be required to be used in that same part of the basin. (*See* Tr. of Denver Oral Arg., pp. 206-09).

New Mexico's objectives in having its existing and authorized uses above and from Conchas Dam fully protected, particularly the Tucumcari Project, are assured by the interpretation of Article IV recommended herein. Similarly, its need for 200,000 acre-feet of conservation storage for consumptive uses in the lower basin is fully satisfied. Indeed, it has contracted to sell only slightly over one thousand acre-feet for such purposes since Ute Dam was constructed in 1963. (Deposition of W. J. Miller, pp. 41-53, Ex. 1). Its only real complaint appears to be that it will be forced to share some of the Conchas Reservoir spills.[45]

3. Development of the Language of Article IV

The foregoing interpretation of the Article IV limitation in light of the broad purposes of the Compact

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[44] There were 16 existing water compacts at the time of the negotiations. *See Witmer*, *supra* n. 3.

[45] Although New Mexico contends that Texas received about half of the Conchas Reservoir spills that Ute Reservoir could not capture in 1987, it is clear that New Mexico believes that it is entitled to all such spills that it can impound, either at Ute or new reservoirs on the main Canadian River below Conchas Dam. Tr. of Dallas Oral Arg., pp. 107-08.

negotiators is confirmed by the following analysis of the development of the precise language of Article IV.

The initial draft of Compact principles proposed by the Engineer Advisors had separate major headings for the North Canadian and South Canadian Rivers and treated the rights of the three States as subparts thereunder. (N.M. Ex. 30, Ex. A, p. 1). With respect to the South Canadian River (later corrected to "Canadian River" (*id.*, Ex. B, p. 1)) it provided the following basic structure:

> Each state shall have free and unrestricted use of the flow of South Canadian River and its tributaries within its own boundaries, subject to the limitations upon storage set forth below.

Building on those principles, Raymond Hill's memorandum of October 13, 1950, to the Legal Advisors recommended restructuring the Compact format so as to have separate articles for each State treating their rights in both the North Canadian and Canadian Rivers. He proposed to lead off each such article with a declaration that the State was entitled to free and unrestricted use of the waters of the Canadian River drainage basin within its boundaries, with New Mexico and Texas subject to specified storage limitations. The introductory language proposed by Hill for New Mexico and Texas was as follows (*id.*, Ex. B, pp. 3-4):

> [New Mexico and Texas] shall have free and unrestricted use of all waters in the drainage basin of Canadian River in [New Mexico and

> Texas], subject to the limitations upon storage of water set forth below . . . .

The suggested limitation upon Oklahoma was framed differently (*id.* at 5-6):

> Oklahoma shall have free and unrestricted use of all waters of Canadian River which originate within its boundaries and of all other waters of Canadian River which at the time flow across its boundaries from New Mexico and from Texas.

No reason was offered by Hill for the different phraseology for Oklahoma and none is apparent.

Texas Legal Advisor Pruett's November 14, 1950 Compact draft adopted the introductory language recommended by Hill for New Mexico and Texas, but proposed no language at all for Oklahoma. (*Id.*, Ex. C, pp. 4-5). Oklahoma Legal Advisor Wilson later commented on that draft by recommending that the language proposed by Hill for Oklahoma in his October 13, 1950 memorandum should be utilized. (N.M. Ex. 35).

The draft prepared on December 5, 1950 modified the introductory language of the limitations on New Mexico and Texas in Articles IV and V by deleting the modifying phrase "in the drainage basin", as follows (N.M. Ex. 30, Ex. F., p. 2):

> [New Mexico and Texas] shall have free and unrestricted use of all waters [~~in the drainage basin~~] of Canadian River in [New Mexico and Texas]. . . .

No explanation was offered for these deletions and, again, none is apparent.[46] The Article VI declaration of Oklahoma's rights adopted the language from the Hill memorandum of October 13, 1950, as recommended by Oklahoma Legal Advisor Wilson. (*Id.* at 3). However, Article VI was subsequently amended in the final version of the Compact to conform to the language used for New Mexico and Texas.

The end result of the evolution of the "free and unrestricted use" language with respect to all three States is that it described all *surface* waters of the Canadian River within the Canadian River drainage basin in each State, whether they "originated" there or flowed into the State from upstream.

Against that background, we turn to the evolution of the disputed language of Article IV(a) respecting New Mexico's rights in the Canadian River above Conchas Dam.

The initial draft of Compact principles prepared by the Engineer Advisors and forwarded to the Legal Advisors proposed a 50,000 acre-foot limitation on additional conservation storage "in the drainage basin of South Canadian River above Conchas Reservoir". (N.M. Ex. 30, Ex. A, p. 2). Raymond Hill's memorandum of October 13, 1950 amended the treatment of New Mexico to reflect his proposed change of structure from one keyed to the "North" and "South" Canadian Rivers to one keyed to separate articles for each State, with separate treatment for the North

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[46] One possibility is that the reference to waters "in the drainage basin" might imply inclusion of non-tributary groundwater in the interstate Ogallala Aquifer, which the Compact did not expressly encompass.

Canadian River and Canadian River thereunder. Thus, in specifying a storage limitation on New Mexico's use of the Canadian River, he confined it to waters of the Canadian River "which originate outside of the drainage basin of North Canadian River". Coupled with the introductory phrase giving New Mexico free and unrestricted use of all waters in the drainage basin of the Canadian River in New Mexico, this maintained New Mexico's free and unrestricted use of the North Canadian River as proposed in the initial draft. However, he did not change the language specifying the limitation on future conservation storage "in the drainage basin of Canadian River above Conchas Reservoir" to substitute the "origination" language for the "drainage basin" language.

The revised draft prepared by the Legal Advisors contained the introductory "free and unrestricted use" language discussed *supra* but no language on storage restrictions, "due to a failure to satisfactorily word those articles of the Compact dealing with restrictions upon storage." (N.M. Ex. 30, Ex. C, p. 1).

After the Engineer Advisors decided to remove any restriction on future conservation storage "in the drainage basin of Canadian River above Conchas Reservoir", they revised the storage limitation on New Mexico in the December 5, 1950, draft as follows (*id.*, Ex. F, p. 2):

> New Mexico shall have free and unrestricted use of all waters of the Canadian River in New Mexico, subject to the following limitation upon storage capacity:
>
> (a) The amount of conservation storage in New Mexico available for impounding

> those waters of the Canadian River which originate in the drainage basin of the Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.

The foregoing evolution of the storage restrictions on New Mexico shows that the initial restriction segregated that portion of "the drainage basin of Canadian River above Conchas Reservoir" from the rest of the Canadian River basin. After the decision not to impose any restriction on that part of the basin, the revised limitation language only imposed a conservation storage limitation of waters "*which originate* in the drainage basin of the Canadian River *below* Conchas Dam." There was no explanation for retaining the italicized "origination" language from Hill's October 13, 1950 memorandum, but neither is there any explanation nor apparent reason why New Mexico's rights in the "lower basin" of the Canadian River below Conchas Dam should have been defined any differently than its rights in the "upper basin" above Conchas Dam were defined in the initial draft. However, Hill's earlier use of the "origination" language did not evidence a purpose to establish a more limited classification than "waters in a particular drainage basin". Consequently, I conclude that Hill did not intend the Article IV(b) "origination" language to differ from his earlier reference to "waters in the drainage basin of Canadian River above Conchas Dam".

The December 5 draft was revised later that day or on the morning of December 6. The limitation on New Mexico was restructured by abandoning the provision for "free and unrestricted use" of *all* Canadian River waters in New Mexico and substituting revised

language providing for "free and unrestricted" use of Canadian River waters "originating" in the upper and lower basins with a 200,000 acre-foot limitation in the lower basin and a special storage restriction applicable only to the North Canadian River. In addition to the probable desire to protect diversions at Conchas Dam for the downstream Tucumcari Project (*supra* pp. 62-66), another apparent reason for this change was that, after it was belatedly determined by the negotiators to impose some limitation on New Mexico's use of the North Canadian River, it was recognized at the last minute that the unlettered introductory partial paragraph of Article IV of the December 5 draft, when read in conjunction with the definition of Canadian River in that draft, continued to permit "free and unrestricted use" of the North Canadian River. Consequently, in order to accurately state the limitation on the North Canadian River, it became necessary to return to the separate treatment of the upper and lower basins. In doing so, the drafters simply extended the most recent language describing the lower basin below Conchas Dam, which contained the "origination" language, to the upper basin. There is no evidence that use of the "origination" language was intended to have any other substantive significance. In particular, for the reasons previously detailed, there is no support whatsoever to support an intention to permit New Mexico to capture spills from Conchas Dam or return flows or seepage from the Tucumcari Project without chargeability under the carefully developed 200,000 acre-foot limitation on future conservation storage in Article IV(b).

4. Subsequent Construction of Article IV

The interpretation recommended herein is also consistent with New Mexico's understanding of the limitation imposed by Article IV(b) at the time it ratified the Compact. The only hint to the contrary is contained in a letter of December 7, 1950 from New Mexico Compact Commissioner John Bliss to United States Senator Clinton P. Anderson (New Mexico) forwarding a copy of the final version of the Compact. In that letter Mr. Bliss stated that under the Compact "New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being that the total storage capacity for conservation purposes of the waters rising below the dam (*not including spills*) shall not exceed 200,000 acre feet". (P. Ex. 28 (emphasis added)). Assuming that the italicized phrase was referring to Conchas spills, which is not wholly clear, this interpretation was not communicated to the other parties or, indeed, to the Governor or legislature of New Mexico, who were responsible for ratification of the Compact. (*See* P. Ex. 30). Mr. Bliss' letter of the same date to New Mexico Governor Mabry describing the Article IV(b) limitation did not include the parenthetical reference to spills contained in his letter to Senator Anderson. Indeed, he reported to the Governor that he had "consulted with the Bureau of Reclamation and checked the records available in this office and find that storage capacity *for all projects which may be feasible below Conchas* will probably not equal the 200,000 acre foot storage limit." (P. Ex. 30, p. 1 (emphasis added)). In his attempt to "sell" the Compact to the Governor, one would expect Mr. Bliss to have embellished his optimistic assessment of New Mexico's

opportunity for future development in the lower basin by adding something to the effect that the State also had an additional margin for development based on the capture of Conchas spills which would not be chargeable against the 200,000 acre-foot limitation. His failure to do so strongly indicates that he did not read the Compact as New Mexico now does.

Significantly, the subsequent message of the Governor of New Mexico transmitting the Compact to the New Mexico House of Representatives and recommending that it be approved described Article IV(a) as meaning "that all development *in the area above Conchas*, and, I might add, almost all present development is in this area, shall continue to operate and develop without compact restriction."[47] This interpretation is consistent with the Compact negotiators' intent to permit New Mexico to do whatever it wished with the upper basin waters it could capture *at Conchas Dam and above*. This understanding was reinforced by Mr. Bliss' letter to New Mexico Governor Mechem some 14 months later discussing the Compact while the Compact consent legislation was still pending before Congress, in which he did not even tie the 200,000 acre-foot limitation to "waters originating below Conchas Dam." Rather, he related the limitation to "construction of new storage reservoirs below Conchas Reservoir" without identification of water source.

[47] P. Ex. 37, p. 3 (emphasis added). New Mexico interprets Governor Mechem's statement that the Compact did not place "any limitation on the right to construct replacement storage below Conchas Dam" as referring to Article IV(a). However, it is more reasonably read as referring to Article IV(b), the provision with the limitation language which Governor Mechem was attempting to minimize.

(P. Ex. 40). This is contrary to the present New Mexico position, under which it would be permitted to build dams on the lower basin tributaries for the conservation storage of 200,000 acre-feet and also build one or more dams on the mainstream below Conchas Dam to capture its spills. (*See* Agreed Material Fact E.5). Finally, a tentative plan for the development of the Canadian River basin in New Mexico prepared by the New Mexico AWR (Arkansas-White-Red) River Basins Coordination Committee in 1953 interpreted the Compact as permitting "New Mexico to entirely deplete the flow of the river *at Conchas Dam*." (N.M. Ex. 56, p. 2-6 (emphasis added)).

Lastly, inasmuch as the consent legislation made the Compact a federal statute, the previously discussed Compact negotiations should be viewed as part of the legislative history of the Compact consent legislation. Although any clear Congressional understanding of disputed provisions to the contrary would arguably be controlling, neither the language of the federal consent legislation nor its relatively sparse legislative history[48] shed any light on this issue. To the extent that the parenthetical statement concerning spills by Mr. Bliss in his letter of December 7,

[48] The House and Senate bills, H.R. 4628 and S. 1798, were introduced without accompanying statements. 97 Cong. Rec. 7296, 7614 (June 27, 1951 and July 5, 1951). No committee hearings were held. The Senate bill was passed on February 25, 1952 without objection or debate after it was amended to incorporate minor technical corrections suggested by the Senate Committee on Interior and Insular Affairs. 98 Cong. Rec. 1303-04; S. Rep. No. 1192, 82d Cong. 2d Sess. (1952). The House bill was amended to conform with S. 1798 shortly thereafter and was passed without discussion on May 5, 1952. H.R. Rep. No. 1725, 82d Cong., 2d Sess. (1952); 98 Cong. Rec. 4805.

1950 to Senator Anderson might be considered an interpretation of Article IV, nothing in the record indicates that this interpretation was also communicated by Mr. Bliss to the Texas and Oklahoma senators, nor is there anything in the legislative history of the consent legislation indicating that Senator Anderson so interpreted Mr. Bliss' parenthetical reference and communicated it in any way to any other senators, particularly those from Texas and Oklahoma.

Beyond the fact that there is nothing in the contemporaneous construction of Article IV by New Mexico at the time of Compact ratification and the granting of Congressional consent to support New Mexico's present claim, there is no evidence that New Mexico adopted and communicated such an interpretation to Texas or Oklahoma, particularly in the context of Canadian River Commission meetings, until after commencement of this suit. The claim to spills was first embodied in a revision of the Ute Reservoir Operating Criteria in October 1987 and incorporated as the second affirmative defense contained in New Mexico's Answer to the Complaint, filed December 4, 1987. The revised operating criteria were subsequently provided to Texas and Oklahoma in April, 1988. (Agreed Material Fact E.27).

There is no evidence that the present New Mexico interpretation was ever previously seriously considered internally in New Mexico, other than an isolated instance in a 1956 New Mexico State Engineer's office staff technical report on an investigation of possible Canadian River storage sites in the lower basin in which the author speculated as follows (P. Ex. 114, p. 1):

> The limit of 200,000 acre-feet [in Article IV(b)] evidently applies only to waters originating in the drainage basin below Conchas Dam and does not include waters originating above Conchas which pass though the reservoir. From 1945 through 1953 an average 21,000 acre-feet of water passed the gaging station below Conchas. It is assumed that sufficient storage, in addition to the 200,000 acre-feet set forth in Article IV, Section (b), could be provided to regulate water originating above Conchas Dam without violating terms of the Compact.

Although this portion of the report was included in the New Mexico State Engineer's Twenty-second Biennial Report (P. Ex. 112, p. 79), a public document required by New Mexico law, there is no evidence that this lower level staff engineer's interpretation was ever approved by the State Engineer's office or its legal counsel or relied on by New Mexico's Governor or legislature at any time during the period that the Ute Dam site was selected and the project authorized for construction. Indeed, the State Engineer's Twenty-third Biennial Report two years later stated:[49]

> At present water *originating* in the drainage area *below Conchas dam, including reservoir spills*, flows down the Canadian River into Texas and is not put to use within the State. The Canadian River Compact, negotiated in

[49] Twenty-third Biennial Report of the State Engineer of New Mexico for the 45th and 46th Fiscal Years (July 1, 1956 to June 30, 1958) at 63 (emphasis added).

1950, allows New Mexico free and unrestricted use of this water, *except that conservation storage for water arising below Conchas Reservoir may not exceed 200,000 acre-feet.*

Most significantly, the 1956 staff interpretation was never directly communicated by New Mexico to its Compact partners until over 30 years later, after this litigation was initiated, so that there is no basis for assuming that Texas and Oklahoma acquiesced in that staff position.

Of similar significance is the fact that this interpretation was not reflected in the NMISC's 1957 notice of its intention to make a formal application for a permit to appropriate water for the Ute Project, which simply listed the "Canadian River" as the source of supply for the project and stated that it proposed to construct a project "in the drainage basin of the Canadian River in New Mexico below Conchas Dam which would provide 200,000 acre feet of conservation storage for irrigation, municipal, industrial uses." (P. Ex. 48). The 200,000 acre-feet of conservation storage specified was obviously intended to keep the project within the Article IV(b) limitation on such storage within the lower basin. But if the NMISC had adopted the interpretation of the 1956 staff report, which it now asserts, it undoubtedly would have made it clear in the application that it intended to provide 200,000 acre-feet of conservation storage of Canadian River waters "originating" below Conchas Dam and that it also would be storing some unspecified quantity of intermingled mainstream waters which had "originated" above Conchas.

The NMISC's subsequent application for a permit to appropriate water for the Ute Project filed in 1960 (P. Ex. 50) refined its statement of water source to be the "Canadian River and tributaries" and, significantly, also stated that the "[w]orks constructed under this Application are subject to Article IV(b) of the Canadian River Compact". Inasmuch as the proposed project was to be located on the mainstream of the Canadian River in the lower basin and would necessarily capture spills from Conchas and return flow and/or seepage from the Tucumcari Project, as well as mainstream and tributary flows originating in the lower basin, it is apparent that the NMISC had not adopted the staff engineer's 1956 interpretation, but had recognized that all waters to be captured by the project, including Conchas spills and Tucumcari return flows and seepage, were subject to the conservation storage limitation of Article IV(b). The New Mexico State Engineer's approval of the permit application in 1962 provides no basis for a contrary conclusion. (*Id.*; P. Ex. 51). It was not until after this litigation had been initiated and the New Mexico claim was first advanced that the NMISC permit for Ute Reservoir was belatedly amended in April 1989 to conform to New Mexico's present interpretation, an action which, under the circumstances, is entitled to no weight whatsoever,[50] at least not in support of New Mexico's position.

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[50] The amended permit was presented to counsel for Oklahoma and Texas by counsel for New Mexico at the meeting between the parties and the Special Master in Denver, Colorado on April 11, 1989. Tr. of April 11, 1989 Denver Conference, pp. 82-88. Although it was not introduced as evidence by any of the parties, it is Special Master's Ex. 2.

Another aid to construction of Article IV is the contemporaneous construction put on that article by the Bureau of Reclamation in planning for the construction of the Sanford Project, whose authorization triggered the negotiation of the Compact. In June of 1949 the Bureau had released a proposed plan of development for the Canadian River Project. (P. Ex. 99). After setting forth the water supply likely to be available for the project and existing water rights in Texas, the report concluded that (*id.* at C-71):

> [a]s portions of the basin lie in the adjoining States of New Mexico and Oklahoma, consummation of a compact among the affected States, allocating the waters of the basin among them, should be a prerequisite to initiation of construction of the project, for the principal purpose of determining the amount of water available for use in Texas.

That recommendation was implemented in the Congressional authorization of the project on December 29, 1950. (*Supra* p. 8). The Bureau therefore obviously had an important interest in the allocations that would be made by the Compact. Thus, Bureau representatives actively participated in the Compact negotiations by providing important hydrologic and other data for consideration by the Engineer Advisors and the Compact Commissioners. (P. Exs. 31, 32, 96A).[51]

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[51] *See also* Minutes of Compact Commission meeting of December 4-6 1950: "The Commission requested the Chairman to send a letter to the regional office of the Bureau of Reclamation at Amarillo thanking that agency for the aid and assistance of certain of its engineers in the technical studies made by the Engineering Advisory Committee." P. Ex. 96C, p.3.

In January 1954 the Bureau released a "Definite Plan Report" on the Sanford Project. That report necessarily had to analyze the limitations on uses in New Mexico imposed by Article IV of the Compact, which had recently been ratified by all States and consented to by Congress, since it would determine the amount of water available for the project. After reciting the provisions of Article IV it assessed future development scenarios in New Mexico as follows (P. Ex. 101, p. 50 (emphasis added)):

> *Except for the contribution received from such* [Conchas Reservoir] *spills*, the water supply for the Canadian River Project therefore must be obtained from runoff originating in the portion of the Canadian River Basin between Conchas Dam and Sanford Dam site, less the streamflow depletion caused by existing water uses and less the streamflow depletion that will be caused by such projects as may be developed in the future.
>
> *The Compact, by limiting the amount of new conservation capacity to 200,000 acre-feet thus establishes a maximum limit on the amount of additional streamflow depletion that will be permitted in the New Mexico portion of the Canadian River Basin.*
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> • • •

The minimum runoff condition at Sanford Dam site would occur with full utilization of Conchas Reservoir to supply the Tucumcari Project, plus development of a new project or projects in the portion of the Canadian River Basin downstream from Conchas Dam

with a total conservation capacity of 200,000 acre-feet.

This construction obviously assumed that the Article IV(b) limitation was a ceiling on *all* future conservation storage in the lower basin below Conchas Dam, including storage of the referenced Conchas spills.

The Bureau's 1954 construction was reiterated in its final Definite Plan Report dated November 1960 (P. Ex. 102, pp. 56, 58 (emphasis added)):

> Under the terms of the Compact, New Mexico is allowed to make full use *of the waters of the Canadian River or its tributaries below Conchas Dam, as obtained from a maximum total conservation storage capacity of 200,000 acre-feet.* This has the effect of limiting the use in New Mexico, below Conchas Dam, to the yield from 200,000 acre-feet of conservation storage, in addition to the full development of the Tucumcari Project.
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> * * *
>
> Operation of the Ute Reservoir to obtain the yield from 200,000 acre-feet of conservation storage would produce the maximum depletion of flow of the Canadian River in New Mexico allowable under the Compact provisions.

It is not usually appropriate to give much weight to the construction of a compact or statute by an agency not charged with its administration, and here the Canadian River Commission, not the Bureau, is the agency charged with the Compact's administration. However, Bureau representatives participated in

the Compact negotiations in 1950 and attended all of the Commission meetings beginning in 1954. (P. Exs. 96A-C, 97B-G). Furthermore, it is reasonable to assume that the federal chairman of the Commission consulted not only with State representatives, but with Bureau officials who had participated in the Compact negotiations a few years earlier. (*See supra* p. 82). In any event it is clear that the Bureau had a special tie to the Commission because of that situation, so that its construction of the Compact should be entitled to reasonable, even if not controlling weight.[52] Moreover, it is significant that the record indicates that the Bureau's 1954 and 1960 interpretations were not objected to by New Mexico, which received copies of the Sanford Project reports for review and comment as an interested state in accordance with established Bureau practice.[53]

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[52] *See Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984). The fact that the Bureau may have had an interest in advancing a construction that would be conducive to providing the maximum water supply for the Sanford Project should not influence the weight to be given that construction, inasmuch as the "safe annual yield" water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills. P. Ex. 102, pp. 62-63.

[53] In its written comments and oral argument on the Special Master's Draft Report, New Mexico relied on certain comments by New Mexico officials made in early 1950 on a 1949 Bureau planning report on the Sanford Project in an effort to demonstrate disagreement with the Bureau's 1954 and 1960 Compact interpretations. Because the Compact was not finalized until December 1950, the earlier New Mexico comments are wholly irrelevant to any Compact interpretation.

5. Burden of Proof

During oral argument on the Special Master's Draft Report held in Denver on June 19, 1990, New Mexico counsel, in discussing the Special Master's rejection of New Mexico's interpretation of Article IV, objected to that determination on the ground that since New Mexico's affirmative defense claiming free and unrestricted use of all waters "originating" above Conchas Dam is a "legal defense to plaintiffs' allegations, plaintiffs have the burden of proof which they have not carried". (Tr. of Denver Oral Arg. at 194). New Mexico also claimed that "[t]he Master also failed to require the plaintiffs to prove that documentary history shows that the literal meaning of this compact is wrong" (*id.* at 204) and that the plaintiffs should carry the burden "because we believe that it should be the state that is alleging the violation that should carry the burden, since it should be assumed that a sovereign state is acting in compliance with the law". (*Id.* at 231-32).

This Court has not explicated the burden of proof in interstate compact cases. Although it has set out a "clear and convincing" burden of proof standard in equitable apportionment cases, *Colorado v. New Mexico*, 459 U.S. 176 (1982) and 467 U.S. 310 (1984), it has never extended that standard to disputes between states over the terms of compacts. Rather, this Court has consistently approached interstate compact disputes as matters of customary contract and statutory interpretation. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("... a compact when approved by Congress becomes a law of the United States, ... but 'a Compact is, after all, a contract' ", *quoting Petty v. Tennessee - Missouri Bridge Comm'n*, 359

U.S. 275, 285 (1959) (Frankfurter, J. dissenting). Although this Court has stated in *dicta* that "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation", *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 209 (1973), under general rules governing suits for breach of contract it is clear that Texas and Oklahoma bear the ultimate burden of persuading the Court that a breach of the Compact has occurred. 9 Wigmore, *Evidence* §§2485, 2489 (Chadbourn rev. 1981). The standard of proof is a "preponderance of the evidence", which is usually defined as a reasonable probability of the truth. 30 Am. Jur. 2d *Evidence* §1164 (1967). Plaintiffs have satisfied that burden.[54]

Even if New Mexico's assertion that a sovereign state should be assumed to be acting in accordance with the law is correct, such a presumption is always rebuttable and may be overcome by a preponderance of the evidence. To the extent that New Mexico is relying on its alleged good faith interpretation of Article IV, this Court's rejoinder to a similar argument

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[54] Alternatively, if New Mexico's claim that it may store water originating above Conchas Dam in reservoirs below Conchas Dam without chargeability under Article IV(b) is viewed as an affirmative defense, which is the manner in which it became at issue, it is a well established principle that when a defendant raises an affirmative defense to an allegation that it has breached a contract, such as the affirmative defense of performance of contract conditions, the defendant bears the burden of proving that defense. 29 Am. Jur. 2d *Evidence* §§129, 142 (2d ed. 1967 and Supp. 1990); 31A C.J.S. *Evidence* §§106, 108 (1964 and 1990 Supp.); *See, e.g., United States v. Poland*, 251 U.S. 221 (1920) (a claim of bona fide purchaser of a land patent is an affirmative defense which must be set out and established). New Mexico has not carried its burden of persuasion on this issue.

in *Texas v. New Mexico*, 482 U.S. at 129, is equally applicable here:

> New Mexico, however, argues that it has no obligation to deliver water that it, in good faith, believed it had no obligation to refrain from using. It is true that Texas and New Mexico have been at odds on the interpretation of the Compact and that their respective views have not been without substantial foundation. . . . But good faith differences about the scope of contractual undertakings do not relieve either party from performance.

VIII. THE WATER IN THE DEAD STORAGE PORTION OF THE UTE RESERVOIR SEDIMENT CONTROL POOL SHOULD NOT BE CHARGEABLE AS CONSERVATION STORAGE UNDER ARTICLE IV(b); WHETHER ANY OF THE WATER IN THE DESILTING POOL PORTION IS CHARGEABLE SHOULD BE REFERRED TO THE CANADIAN RIVER COMMISSION FOR FURTHER CONSIDERATION

Compact Article II(d) defines "conservation storage" in terms of water stored "for subsequent release" for specified purposes and excludes water stored for certain purposes, including "sediment control":

> The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

A central issue in this case is whether water stored in Ute Reservoir which New Mexico has classified as a "desilting pool" is exempt from chargeability as conservation storage under Article IV(b) because it allegedly serves a "sediment control" purpose.

The lowest outlet works at Ute Reservoir are at elevation 3725, below which no water can be released from the reservoir by natural gravity flow. (Agreed Material Fact E.12). This portion of a reservoir is customarily referred to as "dead storage", inasmuch as its principal purpose is to serve as a depository for a major portion of the water-borne sediment en-

tering a reservoir. The capacity of this dead storage pool is 20,700 acre-feet, approximately 9,810 acre-feet of which was occupied by sediment in 1983. (Agreed Material Facts E.12, E.10; Tr. of Dallas Oral Arg., p. 113).

In 1962 the NMISC obligated itself by contract with the New Mexico Department of Fish and Game to maintain a minimum pool at elevation 3741.6 for recreational purposes. (P. Ex. 52). In consideration for maintenance of the minimum recreation pool the Department of Fish and Game reimburses the NMISC for all annual operation and maintenance costs of the reservoir. (*Id.* at 2).

In 1984 the Ute Reservoir Operating Criteria established by the NMISC designated the minimum recreation pool as a "sediment control pool" comprised of the "dead storage pool" and a "desilting pool" (between the top of dead storage and elevation 3741.6) with a total capacity of 49,900 acre-feet. (P. Ex. 81). Some 4,000 acre-feet of the desilting pool was occupied by sediment in 1983. (Tr. of Dallas Oral Arg. at 113). In addition, the Ute Operating Criteria, as revised in 1987, represented that there were some 14,000 acre-feet of sediment deposits in the reservoir above the top of the desilting pool.[55]

The reason advanced by New Mexico for the creation of a desilting pool above the dead storage pool in 1984 is to maintain a relatively silt-free zone above

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[55] P. Ex. 92. This number was arrived at by adding to the total amount of sediment deposited above the desilting pool during the 1963-1983 time period (12,320 acre-feet) the estimated average yearly deposition of 590 feet per year multiplied by three for the years 1984-1986.

the desilting pool from which water may ultimately be withdrawn for municipal and industrial purposes to be served by the proposed Eastern New Mexico Water Supply Project, if and when the project is constructed. This project has been on the drawing board since 1972 and was originally designed to divert 40,300 acre-feet annually from Ute Reservoir to serve the requirements of nine small towns and cities in eastern New Mexico. (P. Ex. 116). However, the water available for the project has been reduced to 18,400 acre-feet due to sediment deposition in Ute Reservoir and only two cities have entered into preliminary water supply contracts in the event the project is ever constructed, one of which recently expired. (Tr. of Dallas Oral Arg., p. 83; P. Exs. 108Z, 108AA, p. 5; N.M. Ex. 73). New Mexico maintains that a project of some sort will ultimately be built. Texas and Oklahoma express skepticism, claiming that the Bureau of Reclamation has estimated the cost for the 18,400 acre-feet of water that could be made available to the cities under present plans would be $1,280 per acre-foot. (Plaintiffs' Comments on Draft Report at 42, citing P. Ex. 142). Consequently, plaintiffs argue that the question of whether or not such a desilting pool should be exempt from any chargeability under the Compact should not even be addressed until steps are taken to develop the project, which they contend will take seven years to plan and construct. New Mexico argues that the status of the desilting pool will be a critical factor that will have to be resolved *before* the project is authorized.

New Mexico contends that the entire 49,900 acre-feet of capacity in the sediment control pool is not chargeable as conservation storage under the Com-

pact because "sediment control" is expressly excluded from Article II(d)'s definition of conservation storage.

Texas and Oklahoma concede that any water stored in the dead storage portion of the sediment control pool is exempt from chargeability as conservation storage, recognizing that the traditional purpose served by dead storage is sediment deposition and that, in any event, such volumes are not physically available for subsequent release as required by the Article II(d) definition of conservation storage since they are below the Ute Reservoir outlet works.[56] However, they disagree that the additional 29,200 acre-feet of storage capacity in the desilting pool is exempt, arguing that the Compact exclusion applies only to capacity allocated or water stored "solely" for sediment control and that since 1962 the desilting pool has served the additional and, in their view, dominant purpose of maintaining a minimum pool for recreation and fish and wildlife purposes. New Mexico counters that the current recreation use of the desilting pool is only "incidental" to its primary sediment control

[56] Neither the Compact nor its negotiation history shed any light on the description of conservation storage as "storage of water for subsequent release". However, it apparently was premised on the assumption that water would be stored behind a conventional dam with outlet works designed to be the sole discharge facilities and in recognition that it would be unfair to charge a State for water stored in dead storage where it physically could not be put to beneficial use. Consequently, in situations where a dam either has no outlet works or water is discharged from a reservoir by means of pumps, the descriptive language is inapplicable and provides no basis for converting water stored for what would otherwise be conservation storage into exempt storage.

purpose and should not vitiate its otherwise exempt status.

As a second line of defense, New Mexico argues that even if the recreation use of the pool is viewed as its dominant purpose, maintenance of a minimum pool for recreation and fish and wildlife purposes is not a "conservation storage" purpose under the Compact definition, nor is such water stored "for subsequent release" as specified in the definition of conservation storage, inasmuch as the NMISC obligated itself under its 1962 contract with its sister agency from releasing any of the water in the minimum pool. This recreation issue is dealt with in Chapter IX.

New Mexico further supports its claim for exempt status for water stored in the desilting pool by pointing to what it contends is similar treatment of certain volumes of water stored at the Sanford Project's Lake Meredith Reservoir in Texas, which is operated by a Texas agency under operating criteria established by the Bureau of Reclamation. At Lake Meredith all reservoir capacity below elevation 2850 is dead storage. However, the Bureau has also (1) prohibited any releases that would lower the lake level below 2855 in order to protect the physical integrity of the dam's outlet works, and (2) designated the reservoir capacity between elevations 2850 and 2860 as "inactive" conservation storage.[57] The volume of water in this in-

[57] The Bureau of Reclamation defines "inactive capacity" as "reservoir capacity exclusive of and above the dead storage capacity from which the stored water is normally not available because of operating agreements or physical restrictions". U.S. Bureau of Reclamation, *Reservoir Data Definitions*.

active conservation pool is 35,900 acre-feet. (P. Exs. 105, 77).

To this last argument Texas responds that there are three major differences in the Ute Reservoir/Lake Meredith situations. First, the restriction on releases at Lake Meredith is imposed by an independent federal entity, the Bureau of Reclamation, whereas the Ute Reservoir operating criteria are unilaterally established and enforced by New Mexico. (Tr. of Dallas Oral Arg., pp. 88-89). Why the source of the restriction on releases should affect the merits of the restriction is not explained. Second, the purpose of the Bureau's special restriction on releases, at least from elevation 2850 to elevation 2855, is allegedly to protect the physical integrity of the Lake Meredith Dam, whereas the self-imposed contract restriction on releases at Ute Reservoir that are otherwise physically achievable without threat of damage to Ute Dam is designed solely to facilitate recreational use of the reservoir. (*Id.* at 89). New Mexico claims that the desilting pool is necessary to prevent damage to pumps that may be pumping water to the planned Eastern New Mexico Water Supply Project. Third, Texas does not treat the water in Lake Meredith's inactive pool between elevations 2855 and 2860 as exempt from chargeability under Article V of the Compact. (*Id.*, P. Ex. 77). However, Texas is not currently in a dispute with Oklahoma over the Compact limits on conservation storage at Lake Meredith, so its present, non-binding concession as to classification of the 39,500 acre-feet is easily made. Because the United States did not intervene in these proceedings, the record has not had the benefit of the Bureau of Reclamation's views on the comparability

of the two inactive conservation storage pools at Ute Reservoir and Lake Meredith. Moreover, assuming the validity of the second and third reasons advanced by Texas to differentiate the two situations, it is clear from the record in this case that the Canadian River Commission has never addressed the merits of the classifications at the two reservoirs.

New Mexico's claim for exempt status for *all* water stored in the sediment control pool established by its 1987 Operating Criteria should not be accepted at this point. There is nothing in the Compact or the history of its negotiation to indicate exactly what kind of reservoir usage the Compact negotiators intended to be encompassed within the concept of "sediment control". At the time of the Compact negotiations in 1950 it was standard practice in the construction of multiple purpose water projects to determine (1) how much storage capacity was needed for active conservation storage or other purposes over the anticipated useful life of the project, (2) how much sediment was likely to accumulate in the reservoir in 50 or 100 years or during the repayment period of the project, and (3) the size of the reservoir necessary to facilitate the accumulation of the anticipated sediment deposition while maintaining the necessary capacity for conservation storage over the project's life. (N.M. Exs. 42 (p. 3), 45B (p. 9.1.1)).

The capacity planned for sediment control usually could not be identified as to specific locations within a reservoir because of the vagaries in the manner in which sediment is deposited on a reservoir floor. However, all reservoir planning provided for a dead storage pool in order to have the outlet works at a level where sediment on the bottom of the reservoir would

not interfere with water releases for various purposes. All of the available evidence indicates that the dead storage pool was recognized as the reservoir area where most of the sediment would be deposited. (N.M. Ex. 45B, p. 9.4.1). Nothing in the literature at the time or since supports New Mexico's claim that the concept of a desilting pool in addition to dead storage was a recognized practice encompassed within the concept of "sediment control" in 1950.

New Mexico's reliance on the established practice in 1950 of constructing small dams for the purpose of sediment control under various watershed protection programs is misplaced. (N.M. Ex. 63). Such dams were constructed "solely" for sediment control and served no other purpose. None of the water was stored for subsequent release for various beneficial uses, but was simply stored in order to prevent its heavy sediment load from causing damage downstream, even though it may have been used incidentally and temporarily for stock watering, recreation or fish and wildlife purposes. (*Id.* at 174-76, 195-96). Indeed, since there were numerous small watershed protection programs operating throughout New Mexico, Texas and Oklahoma under the aegis of the United States Soil Conservation Service in 1950 (*id.* at 166), it may have been such small impoundments built "solely" for sediment control that the Compact negotiators had in mind in excluding such storage from chargeability as conservation storage.[58]

It is difficult to dispute plaintiffs' contention that, even if the desilting pool could be equated with sed-

[58] A representative of the Soil Conservation Service attended two of the meetings of the Compact negotiators. P. Exs. 96A; 96C.

iment control, it is not used "solely" for that purpose. Indeed, in a multipurpose project few areas of the reservoir are used exclusively for any particular purpose. Dead storage comes close to serving only a single function, *i.e.*, sediment control, but even dead storage water helps provide "head" for power generation and affords space for fish habitat where, as at Ute, recreational fishing is an important use of the reservoir. Consequently, the Compact negotiators' use of "solely" to limit exemptions for flood control, power generation and sediment control may unwittingly have imposed an unattainable condition with respect to such exempt classifications in a multiple purpose reservoir. At a minimum, it is clear that they did not fully consider the difficulty in applying that constraint to such projects.

In summary, all that can be said with confidence on this issue is that "dead storage" in a multiple purpose reservoir and any storage of water by a single purpose silt control project were intended to be exempt from chargeability as conservation storage under the Compact because of their dominant "sediment control" purposes.

However, even though the concept of a desilting pool was not within the ambit of sediment control practice addressed by the Compact negotiators in 1950, it may constitute the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance. Essentially the same issue surfaced at the third meeting of the Commission in 1955 when the Oklahoma Commissioner raised the question of whether reservoir *capacity* allocated for *future* sedi-

ment deposition constituted conservation storage until that space was occupied by sediment. (P. Ex. 97C, p. 3). Mr. John Bliss, who had been New Mexico's representative on the Compact Commission in 1950, replied that an answer to that question would require "considerable thought" and suggested that the matter be deferred. (*Id.*). The issue was raised again at the next two Commission meetings in 1956 and 1957, but was not resolved. (P. Exs. 97D, 97E). The minutes of the 1957 meeting show that Oklahoma's motion that "water stored in the sediment pool be treated as water for conservation purposes" and New Mexico's motion that "water in storage allocated for sediment control may not be released for beneficial use" were proposed and failed for lack of a second. (P. Ex. 97E, p. 2). The minutes of that meeting also show that, after further discussion of the issue, the Oklahoma Commissioner stated that the problem "was clear to all and no resolution was needed". The federal chairman agreed. (*Id.*). The basis for those opinions is not apparent.

Fortunately, the issue of how to treat reservoir *capacity* allocated to sediment control before it is occupied by sediment is only relevant if the Compact imposes a limitation on a State in terms of reservoir capacity rather than stored water. Articles V and VI plainly impose no such limitation on Texas and Oklahoma on the Canadian River and, for the reasons set forth earlier in this report, Article IV should not be construed as a capacity limitation on New Mexico. Thus the only way in which the issue could become relevant would be in connection with determining Article V's stored water limitation on Texas on the North Canadian River, which is measured in terms

of water actually stored or that "*could be stored*" in Oklahoma, since the emphasized phrase would appear to relate only to physical *capacity*. That issue is not before the Court.

The record on this issue suggests that one of its most disturbing aspects to Texas and Oklahoma is the perceived high-handed way in which New Mexico unilaterally established the sediment control pool in 1984 and asserted an exemption for it. Consistent with the goals of the Compact, New Mexico should have taken that action in consultation or negotiation with its Compact partners, inasmuch as the effect was to provide the basis for a claim to the right to withhold almost 30,000 acre-feet of water on a permanent basis from the downstream States based on a concept which, however much technical merit New Mexico may believe it has, must be viewed as unprecedented. This is the very kind of issue upon which, for the reasons detailed in Chapter V, the Compact imposed a duty on New Mexico, as well as Texas and Oklahoma, to negotiate in good faith. That did not happen.[59]

Texas and Oklahoma urge that the issue should be resolved at this time because the present record is adequate to do so and further consideration by the Commission is unlikely to produce agreement among the States. New Mexico appears more sanguine. (Tr. of Denver Oral Arg., p. 210). Although the sparse record developed by the parties probably provides an

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[59] Paragraphs (4) and (5) of the recommended decree, *infra* p. 113, require Commission approval of future designations of storage volumes for exempt purposes in order to make it clear that such unilateral actions cannot escape Commission review. *See infra* n. 67.

adequate basis for a decision, I recommend that this issue be referred to the Canadian River Commission and that the States be directed to enter into good faith negotiations to develop a record before the Commission with respect to (1) the propriety of the Ute Reservoir desilting pool classification, (2) the appropriate amount of such storage, if any, that should be exempt from Compact chargeability if it is not "solely" for desilting purposes, (3) whether such a designation, although appropriate, may be premature in light of the fact that the municipal and industrial purposes for which the desilting pool is allegedly needed are not in immediate prospect,[60] (4) the comparability of the Ute Reservoir desilting pool to Lake Meredith's inactive conservation pool, and (5) other relevant factors. The federal chairman of the Commission should obtain the views of the Bureau of Reclamation and Corps of Engineers on those same considerations. If these further proceedings do not produce agreement on the issue within one year from the date of the Court's decree in this case, any of the States may apply to the Court under the recommended decree for its resolution.

The question remains as to how to charge the approximately 25,000 acre-feet of water currently in the desilting pool[61] pending the ultimate settlement or judicial resolution of this issue. I recommend that the chargeability issue not be addressed until the further proceedings on this issue are completed. If the matter is resolved by the Commission, presumably it will encompass all issues related to storage in the desilting pool. If the Court is required to decide the issue and resolves it against New Mexico, issues of appropriate relief can be addressed at that time. New Mexico might be ordered to release some or all of the water in the desilting pool and/or to compensate Texas and Oklahoma monetarily for any injury resulting from New Mexico's withholding of such water in violation of the Compact.

Texas and Oklahoma would rather have the water now than money later for the several years delay in receiving it should they ultimately prevail on the issue. But if those states prevail they may receive both water and damages. On the other hand, if New Mexico were ordered to release the water now and later establishes the exempt status of the desilting pool before the Commission or the Court, it would not be able to recoup the released water easily. Under the recommended procedure, New Mexico retains the disputed water in storage until the issue is resolved, subject to the risk of possibly having to release it and pay damages for past unlawful retention if its contentions are rejected.

[60] For example, the Commission might concede the propriety of exempt status for a desilting pool of some magnitude, but not until the Eastern New Mexico Water Supply Project or similar project, for which the desilting pool is allegedly designed, is close to being a reality.

[61] Some 4,000 acre-feet of the 29,200 acre-feet of capacity of the desilting pool was occupied by sediment in 1983 (Agreed Material Facts E.10, E.19) and some additional deposition has undoubtedly occurred since then. *See supra* p. 90.

IX. NEW MEXICO'S CLAIM THAT WATER STORED SOLELY FOR *IN SITU* RECREATIONAL USE IS NOT CHARGEABLE AS CONSERVATION STORAGE SHOULD BE REJECTED.

New Mexico contends that even if the Ute Reservoir desilting pool is viewed as a recreation pool, as Oklahoma and Texas claim it should be, it is not chargeable as conservation storage because recreational use is not expressly encompassed within Article II(d)'s definition of conservation storage.

Texas and Oklahoma contend that the specified beneficial uses in the conservation storage definition were not intended to be exclusive, but only illustrative of "consumptive" uses that would deplete the stream flow with a resulting adverse effect on downstream states. Since the permanent retention of water in Ute Reservoir for recreational purposes has such an adverse effect, they argue that it should be treated as conservation storage.

The parties do not dispute that the record of the Compact negotiations shows that the question of the treatment of water stored either solely or incidentally for recreation purposes was not addressed by the Compact negotiators. This is undoubtedly because in 1950 recreation was considered primarily as an incidental use of water stored for traditional beneficial uses for irrigation, industrial, domestic and municipal purposes, even though it had been held to be a beneficial use under New Mexico law in 1945.[62] Indeed, it was not established as an authorized project purpose for federal water resource development projects until the Federal Water Project Recreation Act of 1965 (16 U.S.C. §460 *et seq.*). The most reasonable inference to be drawn from Article II(d) defining conservation storage with reference to certain traditional consumptive uses and exempting flood control, power production and sediment control is that the negotiators only wanted to restrict a State's storage of water that was destined for consumptive uses that could deplete the flow available to downstream States. Thus it was apparently assumed that temporary storage of water for flood control or power production would not prejudice downstream users because those volumes would be released and become available to the downstream States.[63] Water maintained in storage solely for *in situ* recreational use at a reservoir, however, would appear to have an equally, if not greater, adverse impact on downstream States than water released for the specified conservation storage purposes, which at least results in some return flow for use downstream. On the other hand, water stored and later released for downstream recreational or fish and

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[62] *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 218, 182 P.2d 421, 428 (1945); *cf. Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1136 (10th Cir. 1981).

[63] Whether a rule of reason should be applied to limit storage for the exempt purposes is not presented in the present controversy, although it is not difficult to imagine hypothetical situations where it should be. For example, a single purpose hydropower project might be constructed that would require an inordinate amount of storage to provide "head" for rather limited power production. The result would be that only the relatively modest amounts of water released through the dam's turbines would ever have a chance of reaching a downstream state, while the bulk of the water below the turbine outlet works would remain in storage. Similarly, outlet works in a multiple purpose dam might be placed at such an elevation as to create an inordinately large "dead storage" pool for sediment collection.

wildlife purposes, such as rafting or maintenance of minimum stream flows for fish and wildlife habitat, is more akin to releases for flood control and power production purposes, since much of such releases reaches the downstream States.

New Mexico contends that this recreation issue has already been resolved by the Commission's 1976 decision not to include reservoirs used solely for recreation purposes in an inventory of reservoirs in the three states subject to the Compact. (N.M. Ex. 44; P. Exs. 98B (pp. 21-23, 98E (pp. 21-36)). However, the Commission action relied on by New Mexico did not purport to deal definitively with the issue, but only excluded such reservoirs from the inventory *at that time*. Subsequent inventories from 1978-86 included recreation reservoirs. (P. Exs. 95Q-95U). Given the oblique manner in which the issue surfaced, the inconclusive nature of the reasons for excluding such reservoirs from the initial 1976 inventory, the absence of any demonstrated intent on the part of the Commission to have the inventory carry any legal effect,[64] and the clear absence of any careful consideration of the issue in a meaningful context such as the enlargement of Ute Dam in 1984 has since presented,

[64] When the Commission later took up the 1977 reservoir inventory report, Oklahoma Commissioner King objected to it because it included reservoirs in watersheds in Oklahoma which Oklahoma did not consider subject to the Compact. Texas Commissioner Duggan moved to note in the report that "[t]he following inventory is for informational purposes and is not intended for the determination of the obligation of the states under Articles IV and V of the Compact." The Texas and New Mexico Commissioners voted in favor of the motion, but it did not satisfy Oklahoma Commissioner King, who voted against it. P. Ex. 97X, p. 5.

it is clear that the Commission has not yet dealt definitively with the issue.

With respect to Ute Reservoir, which has been the focus of this controversy, the application to appropriate the waters of the Canadian River in the lower Canadian River basin by the NMISC in 1960 was stated to be for storage at Ute Reservoir and ultimate beneficial use for "irrigation, municipal, industrial, recreational, fish and wildlife, domestic, and power generation, sediment and flood control." (P. Ex. 50). The permit approved in 1962 was for those same purposes. (P. Ex. 51). The NMISC obviously made its appropriation as broad as possible to give it maximum flexibility to utilize the stored waters as evolving circumstances required. Since the NMISC appropriation is, *inter alia*, for a number of beneficial purposes undeniably encompassed within the Compact definition of conservation storage, such stored waters should *all* be treated as conservation storage since they are not stored solely for expressly exempt purposes, *i.e.*, flood control, power production, or sediment control. The legal status of such waters as conservation storage should not be altered by the fact that they may be used at particular points in time for incidental purposes, such as recreation and fish and wildlife, or are commingled with waters physically available for release for purposes not expressly designated as conservation storage.[65] All such waters remain ***physically*** available for release for the conservation storage purposes specified in the ap-

[65] *See California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (commingled intrastate and interstate gas transported by the same pipeline are both considered to be in interstate commerce); *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

proved permit.[66] Whatever NMISC and its sister state agencies, such as the Fish and Game Department, may choose to do as a matter of *intra*state policy with respect to timing and use of the stored waters for various purposes, all waters stored for non-exempt purposes should be treated as conservation storage as a matter of New Mexico's interstate obligations under the Compact.[67]

The Draft Report concluded that it is unnecessary to decide the Ute Reservoir recreation issue at this time because no justiciable controversy is presented. It reasoned that it is for New Mexico to determine whether it wants to make Ute Reservoir a single purpose recreation facility or whether it wishes to use some or all of the conservation storage in the reservoir to meet the requirements of the cities who would be the beneficiaries of the proposed Eastern New Mexico Water Supply Project. If New Mexico should choose the former alternative and modify the NMISC's permit for the project accordingly sometime in the future, the Commission and, if necessary, this

[66] Texas and New Mexico express concern that New Mexico might construct a reservoir solely for recreational purposes just above the Texas-New Mexico boundary with *no* outlet works and contend that the stored water is not chargeable as conservation storage because it is not stored "for subsequent release" as provided in Article II(d). However, the "release" language was not intended to create such a loophole. *See supra* n. 56.

[67] This Court has made it clear that "it requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting states." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Court could address whether and to what extent stored water devoted solely or predominantly to *in situ* recreation should be chargeable as conservation storage under the Compact. Needless to say, constructive negotiations among the States would be far more likely to produce mutually equitable benefits consistent with the Compact's goals than any decision by this Court.

However, in their written comments and oral arguments on the Draft Report the States pointed out that even if the issue may not present a justiciable controversy with respect to Ute Reservoir, it is directly presented by the situation at Clayton Lake and Hittson reservoirs in New Mexico, which impound some 3,967 and 135 acre-feet, respectively, behind small dams pursuant to permits which only authorize the use of the stored water for recreational and fish and wildlife purposes.[68]

Although the quantity of water involved at those reservoirs is relatively small, so that resolution of the issue will not be determinative of whether New Mexico is or is not in violation of the Compact, a judicial determination at this time may affect the magnitude of what this Report finds to be New Mexico's existing violation and may apply to other similar situations in the future, including possibly Ute Reservoir, thus enabling all parties to better plan for the future.

[68] N. Mex. Exs. 72d, 72i. One other small reservoir stores water only for recreation, fish and wildlife, and domestic stock watering purposes. But, as at Ute Reservoir, because the stored water is to be used in part for a domestic purpose chargeable as conservation storage, all of the stored water should be chargeable.

Countervailing considerations include whether to present the Court with the difficult question of how to deal with an important matter which the Compact has failed to address expressly and the Commission has not yet resolved. For example, although the Commission undoubtedly has the authority to fill in such interstices in the Compact scheme, the voting provisions of the Compact will preclude such action in the absence of unanimity among the Compact partners. In such event, would Texas and Oklahoma have the right, as they contend they do, to rescind the Compact for mutual mistake of fact or law as to its scope, or to bring an equitable apportionment action for an allocation of the use of the Canadian River System solely for the recreational purposes not expressly covered by the compact?

Balancing the foregoing considerations, and because the recreation issue at Clayton Lake and Hittson reservoirs is purely legal, unlike the desilting pool issue, the following conclusions on the merits are recommended.

First, as to the scope of compacts generally, in the absence of express language in a compact excluding certain beneficial water uses from allocations or restrictions made by the compact or persuasive evidence in the record of the compact negotiations evidencing an intent to do so, such allocations should be viewed as encompassing all purposes for which water may be stored or used. Second, applying those two criteria to the Clayton Lake and Hittson reservoirs, water stored there solely for *in situ* recreational use should be chargeable as conservation storage under the Compact. The specified conservation storage purposes in Article II(d) are most reasonably read as illustrative

of traditional "consumptive" uses which would deplete the flow to downstream States, and not as an exclusive list of beneficial uses to be chargeable as conservation storage. Inasmuch as water stored for *in situ* recreation use has a similar impact on the downstream States, it should be chargeable as conservation storage. Likewise, there is no discernible rationale for treating *in situ* recreation as an exempt use, as there is for each of the storage purposes expressly excluded from the definition of conservation storage. The history of the Compact negotiations provides no basis for a contrary conclusion.

For the reason detailed earlier (*supra* note 56), water stored at Hittson Reservoir is not exempt from chargeability as conservation storage even though there are no outlet works making it available for subsequent release.

X. IMPACT OF REPORT RECOMMENDATIONS

There were 232,000 acre-feet of water stored in Ute Reservoir on June 23, 1988, excluding sediment. (Agreed Material Fact F.12). In addition, there are eleven other reservoirs within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet. Eight of these reservoirs with a total capacity of 2,260 acre-feet, including undetermined sediment accumulation, make water available for releases for irrigation use. Three of the eleven reservoirs are maintained to their maximum controlled capacity totalling approximately 4,500 acre-feet, including undetermined sediment accumulation, for recreation, fish and wildlife and domestic stock watering purposes. (Agreed Material Fact F.3).

The States' contentions as to the chargeability of such uses as conservation storage under Article IV(b) of the Compact and the impact of the proposed recommendations in this Report are shown on the table below. If the recommendations are adopted by the Court, the result will be that New Mexico has been in violation of the Article IV(b) limitation since the Spring of 1987. The magnitude of the violation may be increased depending on how the volume of water stored in the desilting pool portion of the Ute Reservoir sediment control pool is classified by the Commission or the Court as a result of the further proceedings on this issue recommended herein.

ARTICLE IV(b) CLASSIFICATIONS
OF STORED WATER IN NEW MEXICO
JUNE 23, 1988
(TO NEAREST 100 A/F)

	New Mexico	Texas & Oklahoma	Special Master
UTE RESERVOIR			
A. Exempt Storage			
1) Orig. Above Conchas	180,900	None	None
2) Dead Storage	10,900	10,900	10,900
3) Desilting Pool	25,100	None	Remand
B. Conservation Storage	15,100	221,100	196,000
SMALL RESERVOIRS			
A. Exempt Storage	4,500	None	None
B. Conservation Storage	1,900[1]	5,800[2]	5,800[2]
TOTAL CONSERVATION STORAGE	17,000	226,900	201,800

[1] 2,260 acre-feet of capacity less estimated sediment accumulation equal to 15% of capacity, which is ratio of silt to total capacity at Ute Reservoir.

[2] 6,760 acre-feet of capacity less estimated sediment accumulation equal to 15% of capacity, which is ratio of silt to total capacity at Ute Reservoir.

XI. RECOMMENDED DECREE

In their comments on the Special Master's Draft Report Texas and Oklahoma requested that the recommended decree be cast in an injunctive form. However, the recommended decree is designed only to state the applicable legal principles derived from the Canadian River Compact which govern the resolution of the present dispute. If the recommendations in this Report are adopted, the subsequent proceedings on appropriate relief will provide the basis for any injunctive relief that may be required.

DECREE

(1) Under Article IV(a) of the Canadian River Compact ("Compact") New Mexico is permitted free and unrestricted use of the water of the Canadian River and its tributaries in New Mexico above Conchas Dam, such use to be made above or at Conchas Dam, including diversions for use on the Tucumcari Project.

(2) Under Article IV(b) of the Compact New Mexico is limited to storage of 200,000 acre-feet of Canadian River water, regardless of point of origin within New Mexico, in reservoirs in the Canadian River Basin in New Mexico below Conchas Dam for any beneficial use, exclusive of the exempt purposes specified in Article II(d) of the Compact.

(3) Quantities of water stored for flood protection, power generation or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife or other purposes not expressly mentioned in the Compact. In situations where storage may be predominantly, though not exclusively, for an exempt purpose, nothing in the Compact precludes the Canadian River Commission ("Commission") from exempting all or an appropriate portion of such storage from chargeability as conservation storage.

(4) Water stored at elevations below a dam's lowest permanent outlet works are not chargeable as conservation storage under the Compact unless other means of water discharge are utilized in the dam's operation, such as pumps, without Commission approval. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission. Water stored for non-exempt purposes behind a dam with no outlet works is chargeable as conservation storage.

(5) Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes must receive Commission approval, which approval shall not be unreasonably withheld.

(6) All water currently stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725 and such portion of the water stored between elevations 3725 and 3741.6 as the Commission or this Court may determine, pursuant to paragraph (10) of this decree, is reasonably stored for sediment control.

(7) There are eleven reservoirs other than Ute Reservoir within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet with a total capacity of

6,760 acre-feet, including undetermined sediment accumulation. All water stored in these reservoirs is conservation storage.

(8) There are 63 small reservoirs in New Mexico with capacities less than 100 acre-feet with a total capacity of about 1,000 acre-feet, which the Commission has treated as *de minimis*. Water stored in these reservoirs is not chargeable as conservation storage.

(9) New Mexico has been in violation of the limitation on conservation storage under Article IV(b) of the Compact since the Spring of 1987. This matter is referred to the Special Master to determine any injury Texas and Oklahoma may have sustained as a result of such violation and to recommend appropriate relief.

(10) The States are directed to enter into appropriate proceedings before the Commission to determine whether and to what extent water may be stored in the desilting pool portion of the Ute Reservoir sediment control pool without chargeability as conservation storage. In making such determination the chairman of the Commission shall enlist the assistance of the Bureau of Reclamation, the Corps of Engineers, and other appropriate federal or state agencies. The Commission shall compile a record of the documents, written legal arguments and any transcripts of testimony or argument on which its deliberations and decision, if any, are based. If unanimous Commission action cannot be achieved within one year of this decree, any State may petition this Court to resolve the dispute. Consideration of the dispute by this Court shall be limited to the administrative record developed before the Commission.

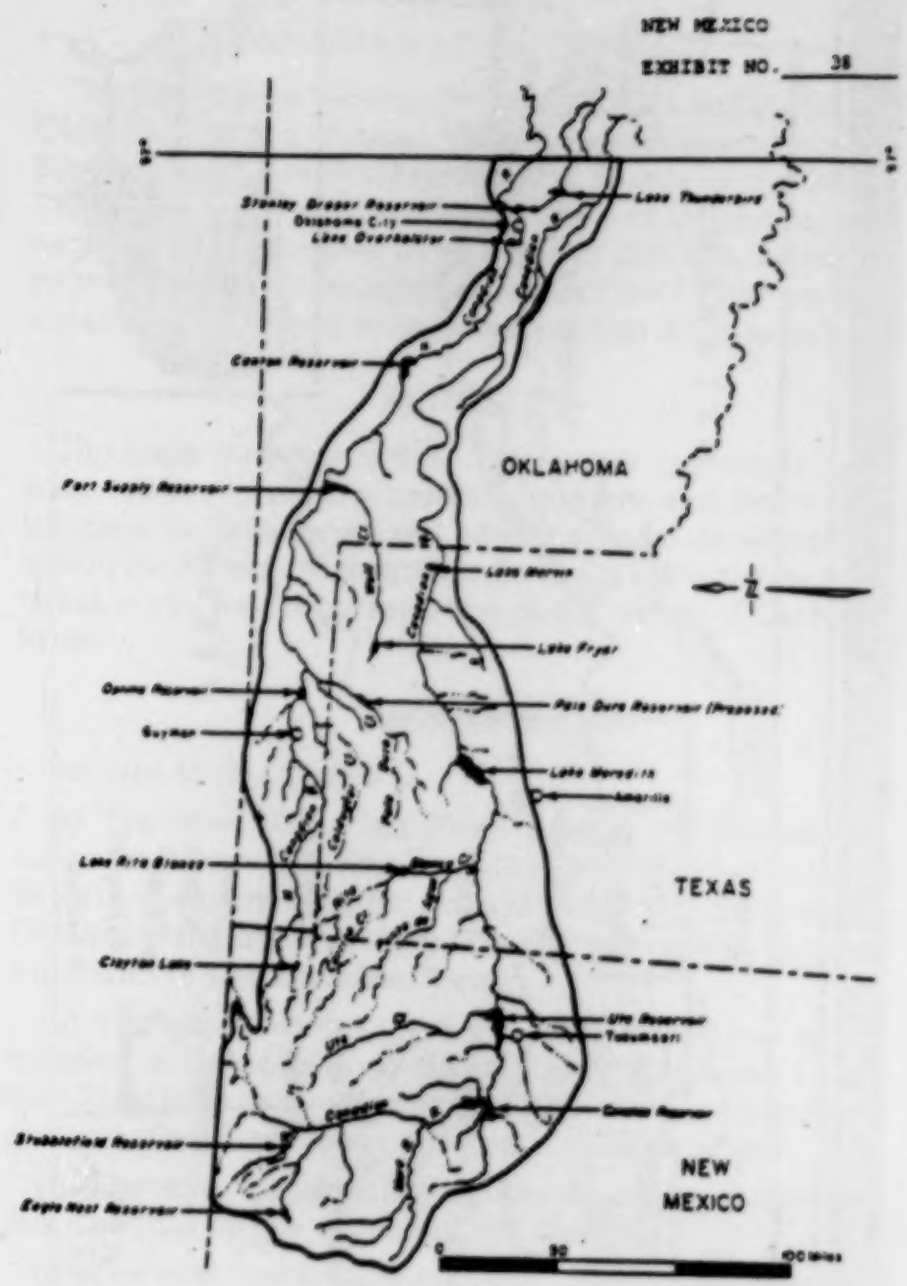
(11) The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of this decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

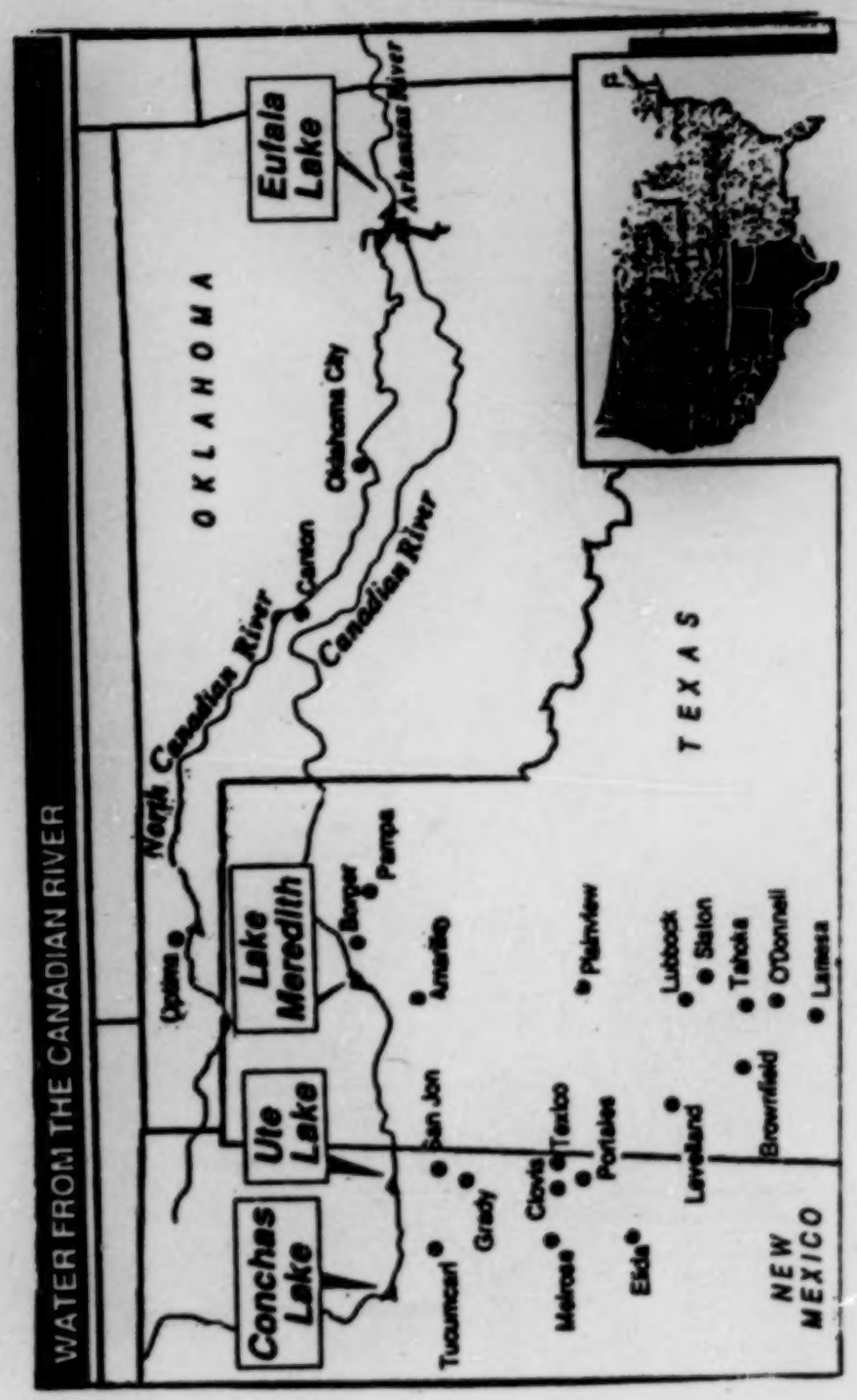
Respectfully submitted,

Jerome C. Muys
Special Master

APPENDIX

APPENDIX NO. 1





APPENDIX NO. 2

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexcio and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and

industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food

and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the

three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualifed independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper admin-

istration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States. The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the United States of America

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 109, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

EXCEPTIONS OF THE STATE OF TEXAS TO REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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December 20, 1990

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No. 109, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

TEXAS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The Court ordered the October 15, 1990, Report of the Special Master filed on November 5, 1990. In these exceptions and in the supporting brief, the Special Master's 1990 Report will be referred to as the Report.

Texas accepts the Report, except for two matters. Texas objects to the recommendation in Section VIII that the Court remand to the Canadian River Commission the issue of whether a portion of the water stored in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control. Texas also objects to the recommendation in Section V that the Court articulate new procedural prerequisites and guidelines in interstate compact litigation.

Respectfully submitted,

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IN THE
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STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

TEXAS' BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Should the Court remand to the Canadian River Commission the issue of whether a portion of the water stored above dead storage in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control.

2. Should the Court articulate new procedural prerequisites and guidelines for interstate compact litigation.

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JURISDICTION

The original jurisdiction of the Court was invoked under Article III, section 2, clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1).

STATUTE INVOLVED

The Canadian River Compact, 66 Stat. 74 (1952) governs this case. The Compact is included in Appendix A of this brief.

STATEMENT OF THE CASE

The Report accurately summarizes this controversy and correctly recounts the procedural history of the case and the background of the dispute. Report at 1-22. Texas offers one clarification. The Special Master sets out a table reflecting the impact of his recommendations and the parties' contentions as to the amount of stored water in New Mexico allocated to Article IV(b) classifications on June 23, 1988. Report at 111. Some of these figures, including the total conservation storage, are based upon the amount of water impounded in Ute Reservoir on that date. The amount of water impounded, and thus the extent of New Mexico's violation, has been considerably greater on other dates. Report at 17; *see also* Agreed Material Facts F-9 through F-14.

SUMMARY OF ARGUMENT

The Court should reject New Mexico's claimed desilting pool exemption rather than remand that issue to the Canadian River Commission. New Mexico has not shown that a desilting pool serves a legitimate engineering sediment control purpose that would be entitled to exemption under Article II(d) of the Compact. Even if the Compact could be interpreted to exempt such a pool, the record shows conclusively that New Mexico does not have any

present need for a desilting pool. If New Mexico should develop such a need in the future, the Commission could then consider a request for redesignation of the pool pursuant to Paragraph (5) of the Recommended Decree.

The Special Master's recommended prerequisites for judicial relief are unnecessary. The Court already has the means of requiring reasonable efforts to resolve compact disputes when states seek to invoke its original jurisdiction. One state's reluctance to negotiate resolution of a compact dispute should not be allowed to prevent or delay another state's ability to invoke the Court's original jurisdiction. The Special Master's recommendation to restrict review to the record and arguments made before a compact commission would be unduly burdensome on the states. The Canadian River Commission is not a federal agency and is not structured or empowered to function as one. It is important that the record be developed under the neutral control of a Special Master.

ARGUMENT

I.

The Court Should Reject New Mexico's Claimed Desilting Pool Exemption Based on the Existing Record

In Section VIII of his Report, the Special Master recommends that the Court remand to the Canadian River Commission the question whether a portion of the water stored above dead storage[1] in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a "desilting pool" component of sediment control. The Special Master acknowledged that the record,

[1]Dead storage in Ute Reservoir is the portion of the reservoir below the permanent outlet works at elevation 3725. The claimed desilting pool is water stored between elevations 3725 and 3741.6. *See* Report at 89-90.

although "sparse," "probably provides an adequate basis for a decision." Report at 99-100. His recommendation that this issue be remanded undoubtedly flows from his proposed prerequisites and guidelines to judicial relief in future interstate compact disputes. These prerequisites are set out in Section V of his Report and are discussed by Texas in its second exception herein. Regardless of the merits of the proposed prerequisites and guidelines, they are inapplicable to this case because the Court has already accepted jurisdiction and should pass on all questions and issues. *See Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

New Mexico's claim for a desilting pool is based on its assertion that the pool would be needed to protect pumps which may be installed in Ute Reservoir to withdraw water for the proposed Eastern New Mexico Water Supply Project ("Project"). New Mexico's Motion for Summary Judgment at 20. However, the record in this litigation does not establish that a desilting pool is a legitimate engineering component of the sediment control function of Ute Reservoir. The Special Master recognized that nothing in the literature in 1950 or since supports New Mexico's claim that use of a desilting pool in addition to dead storage was a recognized practice encompassed within the concept of "sediment control" in Article II(d) of the Compact. Report at 96. The Special Master further found that the Compact negotiators did not include the concept of a desilting pool in the sediment control exemption. Report at 97. A desilting pool, the Special Master concluded, is "a concept which, however much technical merit New Mexico may believe it has, must be viewed as unprecedented." Report at 99.

Even if the desilting pool concept could be shown to be technically supportable, New Mexico's claim for a desilting pool exemption in Ute Reservoir is premature. The Project for which the desilting pool is claimed does not exist today and the record establishes that there is serious question that it will ever exist. Although the feasibility of the Project has been studied since 1972, it has not been authorized or

funded.[2] P. Ex. 142 at 1. The amount of water available for the Project has declined and some prospective customers have lost interest in it. Report at 91. Recent cost estimates have substantially increased to $1,280 per acre-foot of water for a project that would supply 18,400 acre-feet per year, and $1,640 per acre-foot of water for an alternative down-sized project delivering 10,500 acre-feet per year. P. Ex. 142 at 54-56.[3] In light of these problems, Ute Reservoir may never be used as a major municipal and industrial water supply and New Mexico may never need to seek Commission approval for a redesignation of part of its conservation storage as a pool for desilting purposes.

The Special Master, despite making determinations that amply support a decision on the merits, proposes a remand to the Commission because the concept of a desilting pool "may constitute the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance." Report at 97. While Texas agrees that the Commission may address evolutionary concepts, New Mexico's claim for an exempt desilting pool should not be taken up by the Commission until the Project is closer to being a reality. Under the current circumstances, a remand to the Commission would only exacerbate and prolong the injury to the downstream states caused by New Mexico's unilateral assertion of this unprecedented exemption.

New Mexico is claiming an exemption for the pool because it is actually being maintained as a minimum pool for recreation purposes pursuant to a contract between the New Mexico Interstate Stream Commission and the New

[2]Even after authorization and funding, the Bureau of Reclamation estimates that it will require seven years to design and construct the Project. P. Ex. 142 at S-2.

[3]These Bureau of Reclamation cost estimates assume 100% non-federal financing at 9% interest. P. Ex. 142 at 55.

Mexico Department of Game and Fish. *See* Report at 90. New Mexico wants to retain the benefit of that recreation pool and still have its full 200,000 acre-feet of conservation storage under Article IV(b) available for determining the feasibility of the Project. New Mexico will continue to use Ute Reservoir for recreation purposes regardless of whether the Project ever becomes a reality. Such recreation use has been very lucrative for the state. *See, e.g.*, P. Exs. 121 - 125. Of course, if the feasibility of the Project is more important than the recreation use of the reservoir, the two New Mexico state agencies can cancel or amend their contract.

The controversy over New Mexico's claimed exemption of the water in this pool began with the commencement of the enlargement of Ute Reservoir in 1982. Report at 19. New Mexico first asserted that the water was exempt as a recreation and sediment control pool. This assertion was the subject of Commission meetings in 1982 and 1983, and was the focus of a 1983 Commission assignment to the Legal Committee to study and report on legal questions arising out of New Mexico's enlargement of Ute Reservoir. Report at 20-21; *see also* P. Ex. 97AA at 9-10; P. Ex. 98F at 56-62. Texas and Oklahoma, but not New Mexico, prepared and presented reports on these questions at the 1984 Commission meeting. Report at 21; *see also* P. Ex. 97BB at 5-6; P. Ex. 98G at 36-42. Two months later, New Mexico unilaterally issued operating criteria for Ute Reservoir declaring the water exempt as a desilting pool as well as a recreation pool. Report at 21; *see also* P. Ex. 81 at 1-2. Unsuccessful efforts to resolve the controversy continued at Commission meetings in 1985, 1986, and 1987. Report at 21-22; *see also* P. Exs. 97CC, 97DD, 97EE. Throughout all of this controversy, New Mexico has treated the pool as exempt and withheld the water from the downstream states.

The primary function of the Compact is to provide for the equitable division of the waters of the Canadian River by imposing limitations on the allocation of reservoir storage. It is essential to that function that storage allocation

be accomplished through an orderly and equitable procedure such as that set out in Paragraph (5) of the Special Master's Recommended Decree. Under Paragraph (5), the designation or redesignation of storage volumes for purposes exempt from conservation storage chargeability cannot be made unilaterally by a state but must receive Commission approval, which cannot be unreasonably withheld. Report at 113.

Paragraph (5) expresses the Special Master's appropriate concern for preventing unilateral action by a state to exempt reservoir storage. Remand of the desilting pool issue under Paragraph (10) of the Recommended Decree runs counter to this concern by letting New Mexico keep the benefit of its unilaterally declared exemption pending Commission consideration and, as appears likely, ultimate resolution by the Court.

The water in the desilting pool should be classified as conservation storage and charged against New Mexico's Compact allocation until such time as the Commission may determine otherwise. If and when the need arises for New Mexico to utilize Ute Reservoir to serve the Project, it could request a redesignation of storage under Paragraph (5) of the Recommended Decree. The Commission could then consider all relevant factors, including those suggested by the Special Master: the propriety of the desilting pool classification at Ute Reservoir; the appropriate amount of such storage, if any, that should be exempt from Compact chargeability if it is not used solely for desilting purposes; whether such a designation, if appropriate, may be premature; the comparability of storage allocation at Ute Reservoir to that at Lake Meredith; and the views of appropriate federal and state agencies. Report at 100.

A recent order by a Special Master in another original proceeding involving an interstate water compact may be informative and is included herein as Appendix B.

In the Decision of Special Master on Colorado Motion to Stay, *Kansas v. Colorado*, No. 105, Original, Special Master Arthur L. Littleworth denied Defendant's Motion to Stay Based on Kansas' Failure to Exhaust its Administrative Remedies. He ruled that the plaintiff had made reasonable efforts to resolve the dispute at the compact commission level and that remand "would not prove effective, nor would further delay be fair." Special Master Decision, October 21, 1988, in Appendix B at 14.

Summary

The issue whether New Mexico has established a legal right to an exemption under Article II(d) of the Compact for a desilting pool in Ute Reservoir is fully amenable to decision now by the Court. New Mexico was given a full opportunity in the proceedings before the Special Master to establish a legal entitlement to its claimed exemption, but failed to do so. The record demonstrates that the desilting pool concept was not encompassed within the concept of sediment control when the Compact was negotiated and that the Project which allegedly would benefit from the desilting pool will not be a reality for many years, if ever. The record before this Court justifies rejecting New Mexico's claim.

New Mexico may seek a redesignation from the Commission if circumstances change regarding the imminent development of the water supply project. Unless circumstances do change, remanding this issue to the Commission would likely result in an impasse, resolvable only by the Court. *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

An upstream state should not get the benefit of a novel claim for exempting water from chargeability under the Compact until that claim is approved by the Commission. New Mexico should not continue to enjoy its *de facto* exemption based upon a claim of a need to desilt water to

protect pumps that do not now exist and are part of a project that may never become a reality.

The Court should hold that the approximately 25,100 acre-feet of water stored in Ute Reservoir in the so-called "desilting pool" is conservation storage subject to New Mexico's Article IV(b) limitation, and it should allow the injuries suffered by the downstream states to be determined and redressed accordingly.[4] Paragraph (10) of the Recommended Decree should be rejected. The part of Paragraph (6) related to the remand should be modified so that Paragraph (6) reads as follows: "All water currently stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725."

II.

The Recommended Prerequisites and Guidelines for Judicial Relief are Unnecessary and Unduly Burdensome

In Section V of his Report, the Special Master recommends that the Supreme Court use the present litigation to articulate jurisdictional prerequisites and procedural guidelines for application in future litigation arising out of interstate compacts.[5] He recommends requiring the attorney general of a state seeking to invoke the Court's jurisdiction over an interstate compact dispute, or responding to such a request, to certify that the state had negotiated in

[4]It is unclear how the recommended remand would harmonize with Paragraph (9) of the Recommended Decree, which would refer the case to the Special Master for determination of any injury sustained by Plaintiffs and to recommend appropriate relief. The decision on the desilting pool issue will have a significant impact on the extent of Plaintiffs' injury and on appropriate remedies.

[5]The Special Master's recommended prerequisites and guidelines would apparently apply to all interstate compacts, not just to water allocation compacts. Texas has not analyzed the possible impacts on other compacts.

good faith in an attempt to resolve the dispute. Report at 32-33. Texas objects to this recommendation to the extent that it would require a state to make more than reasonable efforts to settle an interstate compact dispute.

The Special Master also recommends that the Court restrict its original and exclusive jurisdiction over interstate compact litigation by limiting review to an "administrative record" compiled by the compact commission, absent good cause shown to adduce additional evidence, and by limiting legal arguments to those presented to the compact commission. Report at 33. Texas objects to these guidelines because they would constitute unnecessary hurdles for states needing relief from compact violations.

States are not required to make more than reasonable efforts to implement compacts and resolve compact disputes

The Special Master appears to be recommending that the Supreme Court require states to make more than reasonable efforts to settle an interstate compact dispute. The Special Master finds that congressional consent to compacts imposes an implied duty that "when states enter into a compact they undertake an implied commitment to make the compact work and to take no affirmative or dilatory action that would frustrate its purpose" and "to participate in good faith in the implementation of the compact plan to carry out its purposes." Report at 30-31. The Special Master further finds that this implied commit ment includes a duty to negotiate in good faith to resolve disputes as a condition to invoking the Court's jurisdiction. Report at 31-32. If the Special Master means that Congress, by granting its consent to a compact, implicitly and unilaterally imposed a duty on compacting states to make more than reasonable efforts to resolve disputes, it may be an impermissible encroachment on the Supreme Court's original jurisdiction under Article III of the U.S. Constitution. *See California v. Arizona*, 440 U.S. 59, 65 (1979).

It is unclear whether the Special Master would have imposed a stricter standard upon Texas and Oklahoma than was applied by the Court when it granted Plaintiffs' Motion for Leave to File Complaint in the instant case. In the Special Master's view, the record in this proceeding did not show sufficient negotiation before the Commission of the issues litigated. Report at 34. However, in his "Statement of the Background of the Dispute," the Special Master sets out facts that demonstrate that Texas and Oklahoma did attempt, through the Commission, to resolve all issues except the defenses that New Mexico first raised after the Plaintiffs sought to invoke this Court's jurisdiction. Report at 19-22. The Special Master further acknowledges that:

> Texas and Oklahoma . . . sought to resolve their concerns with the enlargement of Ute Dam by negotiations within the Commission rather than immediately seeking to invoke the Court's original jurisdiction, negotiations in which New Mexico appears to have been a reluctant participant.

Report at 37.

Certainly New Mexico's reluctance to negotiate resolution of the disputed issues should not have affected Texas' and Oklahoma's ability to invoke the Court's original jurisdiction in this action. The Plaintiffs' efforts to resolve the dispute at the Commission were set out in their Complaint and Brief in Support of Motion for Leave to File Complaint. Complaint and Brief at 9, 30-31. By granting the motion, the Court implicitly determined that those efforts were adequate. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

A state benefiting from a compact violation has little incentive to negotiate an end to the violation. If the injured state is required to do more than make a reasonable effort to resolve a dispute, the violating state's bargaining position would be further strengthened. The Special Master

recommends that sanctions be available if the Court finds that a state had not negotiated in good faith. Report at 33. However, the Court can already impose sanctions if it concludes that a state had not made a reasonable effort to resolve a dispute — and it should impose such sanctions on New Mexico in the present case. To be effective, sanctions should be sufficient to remove any economic benefit gained by a state violating a compact.

The Special Master suggests that the requirement of good faith negotiations would serve a function analogous to the doctrine of primary jurisdiction. Report at 32. This doctrine is used to allow an agency to apply expertise to factual issues not within the conventional experience of judges, to allow the exercise of administrative discretion, and to promote uniformity and consistency in a regulatory scheme. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). The doctrine is inapplicable here because there are no material factual issues that remain to be decided to resolve the controversy and because the Commission is not administering a regulatory scheme. In addition, the resolution of the disputes in this case does not require unique expertise outside the conventional expertise of judges.

The record and legal arguments should not be restricted to those made before the compact commission

The Special Master suggests that the Court adopt procedures analogous to those used to review federal agency action, and confine its review in compact cases to the record compiled and arguments made in compact commission proceedings. Report at 33. A compact commission, however, is not a federal agency.

> No state or federal intent to create a federal agency is shown. The use of interstate compacts is diminished if they create a federal

> administrative agency subject to all the ramifications of federal statutes and federal decisions delineating the scope of judicial review of administrative action. As said in *California Tahoe Regional Planning Agency v. Jennings*, 9 Cir., 594 F.2d 181, 190 (1979), cert. denied 444 U.S. 864, the consent of Congress 'did not make applicable to the agreement the entire panoply of *federal* administrative and substantive standards.' [Emphasis in original.]

Special Master's Report and Recommendations, *Texas v. New Mexico*, No. 65, Original, September 10,1982, ordered filed 459 U.S. 940 (1982).

Unlike a federal agency, the Canadian River Commission does not have the expertise or the experience to handle contested hearings and to decide contested legal issues. The Commission is not a forum where complex legal issues are litigated and where an impartial decision-maker summons witnesses, presides over hearings conducted according to the rules of evidence, renders objective rulings, and compiles formal administrative records.

The Commission has no authority other than that expressed in the Compact. The Compact, designed to be largely self-executing, sets out minimal functions and imposes minimal duties, and does not empower the Commission to conduct formal adjudicative proceedings. The Commission consists of one commissioner from each state and a non-voting federal commissioner. Any action by the Commission requires the unanimous consent of the three state commissioners. There is no mechanism within the Compact to resolve an impasse.

The Canadian River Commissioners, like compact commissioners generally, are different from federal hearings examiners deciding cases for federal agencies. They are

political appointees of various backgrounds and experience who serve the states that appointed them, rather than acting as objective triers-of-fact. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

Given the structure of the Commission and the requirement that action be by unanimous agreement, it is difficult to see how a formal adjudicative record could be compiled on matters over which the Commission was at an impasse. Commissioners unable to agree on the merits of a matter probably could not agree to convene a formal hearing. Even if they convened a hearing, the impasse on the merits would likely be reflected in disagreement on evidentiary rulings and procedural questions.

Another problem with restricting the Court's review to the record compiled by a compact commission is that it would remove the scrutiny of a neutral Special Master from the process of creating and controlling the record. Parties would attempt to submit all remotely favorable material into the record, regardless of the relevance of the material. The Commissioners might not be able to agree to admit any evidence into the record. Conversely, they might agree to admit all offered evidence. In the first scenario, the result would be a useless record; in the second, it would be an unwieldy, cumbersome record containing much extraneous and irrelevant material. Neither record would offer a sound basis for decision.

Furthermore, the Special Master would not have the advantage of assessing the credibility of live witnesses or asking them questions. It is more difficult to understand and appropriately weigh testimony and exhibits from a cold record then from live proceedings. *See Colorado v. New Mexico*, 467 U.S. 310, 326 (1984) (Stevens, J., dissenting).

Limiting the states to the legal theories raised before the compact commission could result in incomplete resolution of disputes and piecemeal litigation. Where

states are before the Supreme Court for the determination of a controversy between them, the Court must pass upon every question essential to such a determination. *See Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

Summary

The Special Master's recommendations are, commendably, intended to reduce the number of interstate compact disputes requiring resolution by the Court.[6] Although good faith negotiations could be expected to resolve some compact disputes, the recommendations do not include an effective mechanism for ensuring that good faith negotiations actually take place. As a result, it is more probable that the requirements would serve only to delay resolution of most interstate compact disputes. The recommendations would place additional burdens on states needing relief from compact violations out of proportion to any benefits gained. The best way to reduce litigation over interstate compacts is to deter violations by affording prompt, meaningful, and complete relief to injured states.

CONCLUSION

For the foregoing reasons, the exceptions of the State of Texas to the Report should be sustained. The Court should reject New Mexico's claim for a desilting pool exemption in Ute Reservoir and should classify that pool as conservation storage under Article IV(b) of the Compact. The Court should decline to impose a more rigorous negotiating requirement on states seeking to invoke its original jurisdiction to resolve interstate compact disputes. The Court should also decline to limit the records and arguments in interstate compact actions to those made before

[6]It is conceivable, however, that the recommendations could result in increased litigation involving more minor compact issues. A compact commission unable to reach agreement on a *de minimis* matter might refer it to the Court more readily if creation of a record before a Special Master were not required.

compact commissions. The Court should assess all costs of this litigation against New Mexico as a sanction for failing to make reasonable efforts to resolve this dispute at the Commission level. The Court should adopt the Special Master's Recommended Decree, with the modifications requested on page 8 herein. In all other respects, the Court should adopt the recommendations in the Report.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity

specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualified independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper administration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States.

The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the
State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the
State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the
State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the
United States of America

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,	)	
	)	
Petitioner,	)	No. 105, Original
	)	October Term, 1985
v.	)	
	)	
STATE OF COLORADO,	)	
	)	
Respondent.	)	
	)	

DECISION OF SPECIAL MASTER ON COLORADO MOTION TO STAY

Colorado filed a Motion to Stay Based on Kansas' Failure to Exhaust Its Administrative Remedies. The Motion dealt with two of the several issues in the Complaint: i.e., post-Compact well development in Colorado, and the operation of Trinidad Reservoir. The Motion was fully briefed, and oral argument was held in the Federal Court of Appeal in Pasadena, California on September 28, 1988. David W. Robbins, Esq. argued the Motion for Colorado, and Richard A. Simms responded for Kansas.

Kansas acknowledges that it has an obligation, before seeking judicial relief, to exhaust its administrative remedies under the Arkansas River Compact. The Compact was ratified by the respective legislatures of each state, and approved by Congress in 1949. (Act of May 31, 1949, 63 Stat. 145) The Compact Administration is similar to that discussed in *State of Texas vs. State of New Mexico* (1983) 462 U.S. 554, 77 L.Ed.2d 1; 103 S.Ct. 2558. The Administration consists of three representatives from each state, but each state ". . . shall have but one vote in the Administration and every decision, authorization or other

action shall require unanimous vote." (Article VIII-D) While a representative of the United States chairs the Administration, he has no vote. (Article VIII-C)

Only two specific remedies for alleged Compact violations are provided for in the Compact. It provides that violations shall be "promptly investigated" by the Administration, although the procedure for the investigation and any remedies still require agreement between the states. (Article VIII-H) In addition, disputes "may," by unanimous vote, be referred for arbitration. (Article VIII-D) Both parties agree that the exhaustion test under the circumstances involved here is whether a state has made a "reasonable effort" to proceed first through the Compact Administration. Colorado also acknowledges that it is proper to seek judicial relief if an investigation by the Administration reaches an impasse. (Colo. Br., p. 21) Colorado, as part of its Motion, filed four large volumes of Appendix documents, going back several years, which appear to include the Compact Administration record with respect to post-Compact well development and the operations of Trinidad Reservoir. Both parties relied upon this record in their briefs and arguments.

Kansas argues first that the exhaustion issue was actually decided by the United States Supreme Court when it authorized the filing of Kansas' Complaint. Kansas moved to file its Complaint on December 16, 1985, alleging that the State of Colorado and its water users had materially depleted the usable and available stateline flows of the Arkansas River in violation of the Compact. Kansas further alleged that Colorado had blocked Kansas' efforts to have the Compact Administration investigate its complaints.

On February 18, 1986, Colorado filed a brief in opposition to Kansas' Motion for Leave to File Complaint. The thrust of that brief was that Kansas had not made a "reasonable effort" to resolve its complaints through the Compact Administration, and that absent such an effort,

the Supreme Court should decline to hear the matter. (p. 1) Colorado stated that the question presented was whether Kansas had met its burden ". . . to demonstrate that a pending investigation of the Arkansas River Compact Administration is not an adequate means to vindicate its allegations of Compact violations." (p. 3) In its brief, citing certain documentary evidence, Colorado alleged that there was a "pending investigation" by the Compact Administration, that the Administration was not deadlocked or unable to act, and that Colorado had not refused to investigate Kansas' allegations. (pp. 8-9) However, Colorado did not file with the Supreme Court the same voluminous administrative record used to support its Motion before the Special Master.

In response to Colorado's brief, Kansas on March 3, 1986 filed a new motion in the alternative, either for leave to file its complaint, or to compel an investigation by the Compact Administration pursuant to Article VIII-H. In its supporting brief, Kansas outlined in further detail its view of efforts taken within the Compact Administration, and the alleged frustration of the administrative procedure. Thus, the question of whether the administrative process had been properly exhausted was clearly an issue in the pleadings before the Supreme Court.

The Supreme Court's Order stated simply:

> "The motion for leave to file a bill of complaint is granted. Defendant is allowed sixty days within which to file an answer."

Kansas contends that the Court made a choice between the alternatives presented in its Motion, and thereby disposed of the exhaustion issue. Colorado, on the other hand, argues that the Court's silence is not a basis for inferring intent, and had the Court intended to decide the exhaustion issue, it would have ordered argument and decided the issue explicitly.

The requirement of a motion for leave to file a complaint and the requirement of a brief in opposition do enable the Supreme Court to dispose of matters at a preliminary stage. (*Ohio v. Kentucky* (1973) 410 U.S. 641, 644) As the Court has explicitly recognized, its objective in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presents. (*Id.*) To this end, the Court has strongly suggested that granting an original plaintiff's motion for leave to file complaint amounts to a rejection of arguments that the case should be dismissed. (*Maryland, et al. v. State of Louisiana* (1981) 451 U.S. 725, 740, fn. 16) Further, in the analogous case of *Texas v. New Mexico* (1983) 462 U.S. 554. the Court intimated that "fundamental structural considerations," such as an interstate compact that accords each signatory state the power to veto authoritative commission action, may abbreviate inquiry into the question of whether an available remedy exists at the administrative level. (462 U.S. 54, 568-570)

It is not necessary, however, to decide Colorado's present Motion on the basis of the Supreme Court order. The Special Master is convinced that Kansas did make a reasonable effort to pursue its complaints through the Compact Administration, but because of the inherent limitations in that procedure, the parties reached an impasse. Indeed, the briefs and oral argument on the Motion dealt primarily with the substance of the efforts before and by the Compact Administration, and not upon the Supreme Court order.

First, with respect to post-Compact well development, Kansas cites numerous law reviews and other secondary sources to show that unregulated well development, and its impact on surface water users, has been a problem for many years. (Kan. Br., pp. 30-31) By 1983 Kansas began its own study of the decline in flows of the Arkansas River, and the development of upstream wells in Colorado as a possible cause. Completed in 1984, that study concluded that for the

period 1974 to 1981 a conservative estimate of the stateline depletions due to post-Compact wells in Colorado was 40,000 to 50,000 acre-feet per year. (Appendix Exh. 21, p. iii) Colorado and the Compact Administration were aware of that study. Nonetheless, Colorado contends that Kansas did not formally seek a Compact investigation of this issue until February of 1985. (Colo. Closing Br., pp. 21, 27) Assuming that to be true for purposes of this Motion, there is no question that on March 28, 1985 the Compact Administration directed a formal investigation of the depletion of stateline flows. A number of potential causes were to be investigated, including specifically "well development of the waters of the Arkansas River in Colorado," as well as "the operation of the Trinidad Dam and Reservoir project." (Appendix Exh. 28, attached Exh. L)

The Compact Administration Resolution directed that the investigation be undertaken by a committee consisting of the Director of the Colorado Water Conservation Board and the Chief Engineer of Kansas, or their respective designees. Thus, the same unanimity requirements that limited the Administration itself were carried over into the structure of this investigation. Finally, the March 28 Resolution called for the investigation to be completed by the next annual meeting of the Compact Administration on December 10, 1985.

The engineers for the two states met promptly, but were unable initially to agree upon a scope of work for the investigation. (Appendix Exh. 29) At their next meeting they agreed to defer consideration of a complete scope of work, and defined instead a preliminary scope that included the compilation of certain data and construction of a series of mass diagrams. (Appendix Exh. 30, p. 2) The mass diagrams were presented at their meeting on July 12, 1985, but again the two engineers were unable to agree "about what the diagrams did or did not show." (Appendix Exh. 32, p. 4) Finally they decided to prepare and exchange separate reports analyzing the mass curves, and recommended that

the Compact Administration hold a special meeting on October 8, 1985 to receive such report as the committee might be ready to make. (*Ibid.*) The committee met once again on September 17, "... but was unable to agree on the conclusions to be drawn from the single and double mass diagrams and on what further investigation, if any, should be undertaken." (Appendix Exh. 34, pp. 4) J. William McDonald, the Colorado representative on the committee, reported to the Compact Administration that the committee had "reached an impasse" at its September 17 meeting. (Appendix Exh. 36, p. 2)

Against this background, the Compact Administration met on October 8, 1985. The Colorado representative acknowledged that there had been a "substantial decline in usable stateline flows starting in 1974." (Appendix Exh. 36, p. 4) However, he did not see post-Compact well development as the cause. He stated:

> "It seems to me that all the engineering shows thus far is that there has been a decline in usable stateline flows starting in 1974, which corresponds it appears to me, to a decline in tributary inflow rather than to well development or any other beneficial development in the Arkansas River basin in Colorado." (Appendix Exh. 37, p. 32)

Colorado therefore took the position that the investigation should first examine neither the well issue nor the operations of Trinidad Reservoir, but (1) reduced diversions by ditches in Colorado Water District 67; (2) the operating plan for John Martin Reservoir; (3) decreased plains precipitation; and (4) soil conservation measures. (Appendix Exh. 37, p. 35)

With respect to well development, the Colorado representative stated:

> "In that context I do not believe it is appropriate to launch an investigation of well pumping in Colorado as David (David Pope, Kansas State Engineer) has urged in his second report until we have determined whether the declines in usable stateline flows might be the result of other causes, which I believe to be more likely than the causes which David has addressed. ... And it has been my position therefore that the investigation should indeed continue, but it should start first with those factors which at this point in time appear to be most likely explanations for the decline in usable stateline flows." (Appendix Exh. 37, pp. 31-32)

Kansas, on the other hand, urged that the investigation proceed to examine ten possible causes for the decline in stateline flows, including all those suggested by Colorado, and including well development and the operations of Trinidad Reservoir. (Appendix Exh. 37, pp. 35-36) The Compact Administration finally adopted a Resolution that the committee continue its investigation only of those matters mutually agreed upon, that is, the four items suggested by Colorado. (Appendix Exh. 37, pp. 37-38)

Colorado now argues that it did not "rule out" an investigation of the impact of post-Compact wells on stateline flows, but neither did it commit that Kansas' complaints would ever be investigated. (Colo. Closing Br., p. 28; Appendix Exh. 37, p. 33) The facts are that in March the Compact Administration directed an investigation of post-Compact well development and the operations of Trinidad Reservoir, as possible causes among others for the decline in stateline flows. The investigation was to have been completed within the year. Yet by October, at Colorado's insistence, those two matters had been dropped from the

committee's investigation agenda. Kansas had a right to have its complaints "promptly investigated" and not side tracked by Colorado's belief that other factors might have more likely caused the decline in stateline flows. (Article VIII-H)

The well issue came up again at the Compact Administration's annual meeting on December 10, 1985. Kansas asked Colorado directly whether it would be ". . . willing to immediately begin a prompt and expeditious investigation of post-Compact alluvial well development in the Arkansas River Basin in Colorado. (Appendix Exh. 39, p. 107) Kansas never received an affirmative reply.

At that meeting, Kansas also presented a report from the nationally known consulting firm of S. S. Papadopulos and Associates. The report concluded that the investigation methodology proposed by Colorado, namely, focusing first on separate factors like climatic conditions, would not "produce meaningful conclusions regarding the alleged violations"; that the various possible factors must be examined contemporaneously, "regardless of preconceived notions as to the relative effects of any one factor"; and that studies had demonstrated that ground-water development and reservoir regulation "impact significantly the streamflow conditions within the river system," and "must be included" in order properly to investigate Kansas' allegation. (Appendix Exh. 39, Exh. E, pp. 5-6)

Kansas filed its motion with the Supreme Court six days later on December 16, 1985, having previously announced after the October 8 meeting that the States were at an impasse, and that such an action was being prepared. (Appendix Exh. 38)

Turning now to the operations of Trinidad Reservoir, Colorado concedes that Kansas first complained about this issue in 1980. (Colo. Br. pp. 9, 24) Through an administrative practice known as "rollover," Kansas alleged that additional

water was stored in Trinidad Reservoir, in violation of the Compact. The Administration found that the amount in volved for 1979 was 18,290 acre-feet. (Appendix Exh. 13) At a Compact Administration meeting in 1980, Kansas sought to have the Administration recommend that the State Engineer of Colorado order the release of such stored water, but Colorado voted "no." (Appendix Exh. 13, Colo. Br. p. 9) The rollover practice was continued, and Kansas contends that by 1982 some 58,514 acre-feet of water had been illegally stored. (Kansas' Response, p. 27) Admittedly, Kansas sought arbitration of this issue in 1982, in 1983 and again in 1985. (Appendix Exh. 16, pp. 78, 87; Exh. 28, pp. 168-170) Colorado declined, due to the "failure of the State of Kansas to identify the underlying factual basis for its claims." (Appendix Exh. 16, pp. 88, 85)

In 1983, therefore, Kansas undertook its own study, hiring Simons, Li & Associates, Inc. That study was completed in February, 1984 and concluded in part:

> "Since 1979, the Trinidad Project has been operated in a manner different than that envisioned by the Bureau of Reclamation and that approved by the Compact Administration. It is estimated that these deviations in the Trinidad Project operation have caused an additional 26,000 to 35,000 acre-feet of depletions to downstream water users." (Appendix Exh. 21, p. iii)

As previously indicated, the Trinidad issue was finally included as part of the investigation authorized by the Compact Administration on March 28, 1985. However, like the well development issue, Trinidad was dropped on October 8, 1985.

Colorado's principal argument with respect to Trinidad Reservoir is that reservoir operations are currently being reviewed and analyzed by the United States Bureau

of Reclamation. Colorado claims that the Bureau's study, which was begun in 1984, embraces all of Kansas' complaints. The study was requested by the Compact Administration following the Simons, Li report, but was also independently required as part of a five-year review procedure. The Bureau's final report is expected at any time. Two draft reports have been issued earlier, and Kansas maintains that there are both "methodological and legal objections" to the last draft. (Kansas Response, p. 29) However, the scope and efficacy of the Bureau's study are not the issue. There is nothing to show that a routine, though timely, study by the Bureau constitutes a Compact investigation. Indeed, the Compact administration presumably would not have included the operations of Trinidad Reservoir within its March 28, 1985 investigation if the Bureau's study had been intended to serve that function. The Bureau's study may provide valuable data on the issue, but it is not a substitute for action by the Compact Administration to investigate Kansas' complaints.

The decline of Arkansas River flows into Kansas appears to be admitted. At issue are the cause or causes, and whether Compact violations are involved. Kansas has made good faith allegations of such violations, and has pre sented preliminary studies to support its position. Certainly the future effectiveness of the Compact Administration re quires timely resolution of these allegations. However, the Administration structure is such that even a preliminary investigation of the allegations has not proceeded. By exercising its veto on the Commission, though done in good faith, Colorado has effectively prevented "authoritative Commission action." (cf. *Texas v. New Mexico*, *supra*, 462 U.S. 554, 568)

The Special Master believes that Kansas has met its obligations under the law, and that returning these issues to the Compact Administration would not prove effective,

nor would further delay be fair. Accordingly, Colorado's Motion is hereby denied.

DATED: October 21, 1988

/s/ Arthur L. Littleworth

Arthur L. Littleworth
Special Master

(11)

No. 109, ORIGINAL

FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

NEW MEXICO'S REPLY TO TEXAS' AND OKLAHOMA'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

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January 22, 1991

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SUMMARY OF ARGUMENT

Oklahoma and Texas have filed separate exceptions to the Special Master's Report (October 15, 1990) ("Report"). Oklahoma takes exception to the Report's recommended ruling that the Canadian River Compact, 66 Stat. 74 (1952) ("Compact"), limits water in storage in New Mexico, not physical reservoir size or total capacity. Texas does not join Oklahoma's objection, abandoning the capacity issue, the principal issue of the lawsuit at the time of the original complaint. Oklahoma's arguments are erroneous and lead to impractical results. The Report correctly decided the issue.

Texas challenges the Report's recommendation that the issue concerning the Ute Reservoir desilting pool be remanded to the Canadian River Commission ("Commission") for further fact-finding and negotiation. Texas' exception is misplaced. The issue may be moot, and, if not, the Court will be assisted by the Commission's technical review of the desilting pool's sediment control functions, or by an evidentiary hearing before the Special Master. Such further proceedings will not harm Texas irreparably, if at all. If the Court decides the issue, New Mexico should prevail.

The parties agree regarding certain objections to the Report's procedural suggestions. Texas, however, requests sanctions against New Mexico. The Texas request for sanctions is improper and should be denied because Texas has conceded the capacity issue, and New Mexico was not reluctant to negotiate that issue.

ARGUMENT

I. The Report Correctly Recommends a Ruling that the Compact Does Not Limit Physical Size of New Mexico's Reservoirs. Oklahoma's Exception to the Recommended Ruling is Erroneous and Contradictory

Oklahoma excepts to the Report's recommended decision that the Compact limits only the amount of water in storage in New Mexico's reservoirs, not the total capacity of those reservoirs, even though Texas explicitly accepts that recommendation in its exception and does not join Oklahoma. *Compare* Exception of the State of Oklahoma (December 20, 1990) *with* Exceptions of the State of Texas (December 20, 1990). The chief flaw in Oklahoma's argument is Oklahoma's failure to acquaint the Court with what is really at stake in the capacity question. When the practical consequences of Oklahoma's position are examined, it becomes patent that the Compact negotiators could not have intended what Oklahoma hopes to force upon New Mexico.

Oklahoma starts from the premise that the Compact's purpose was to limit storage of water in New Mexico, and observes that "either limitation mechanism, *capacity or waters-in-storage*, would achieve the Compact's purpose[s]." Oklahoma Brief at 8 (December 20, 1990) ("Ok. Br.") (emphasis in original). In fact, however, it matters dramatically whether the Compact is interpreted to limit total reservoir capacity or simply waters in storage.

The real purposes of the Compact, as Oklahoma concedes, are to "protect present developments within the [signatory] States" and to "provide for the construction of additional works." Compact Art. I; Ok.

Br. at 8. A limit on total reservoir capacity in New Mexico would directly contradict these purposes, even if an exception is made for dead storage.[1] If the Compact is misread to limit reservoir capacity in New Mexico, New Mexico's Compact allocation will be continually decreased due to constant sediment deposition in Ute Reservoir, and the amount of water available to New Mexico for release from conservation storage will be reduced. It is contrary to the explicit purposes of the Compact to deprive New Mexico of the conservation storage right expressly given to it by the Compact.

Oklahoma has never successfully answered this contradiction. *See* Tr. at 56-71, 177-78 (November 1, 1989) (exchanges between Special Master and Oklahoma Counsel of Record, where Master pressed Oklahoma on the sediment issue). Even if Oklahoma were to suggest that New Mexico could build replacement storage as silt fills its reservoirs, New Mexico's Compact allotment would be reduced. New reservoirs would regularly have to be built, or existing ones enlarged, at enormous cost to New Mexico. This would effectively reduce New Mexico's Compact share in relatively short order. This cannot be what was envisioned under the Compact. The Compact gives New Mexico the right to have 200,000 acre-feet of conservation storage for water originating below Conchas Dam. Dams must be constructed to provide sufficient capacity for sediment deposition in addition to adequate conservation storage. Oklahoma, however, does not consider the need to construct reservoir capacity for

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[1] Oklahoma apparently does not claim that total reservoir capacity includes dead storage at Ute Reservoir. *See* Tr. at 57-59 (November 1, 1989).

sediment deposition.[2] Oklahoma's interpretation of the Compact, which deprives New Mexico of its Compact right as a practical matter, cannot be correct.

Oklahoma's legal arguments are likewise erroneous. Oklahoma is incorrect that a "plain reading" of Articles IV(b) and II(d) of the Compact supports a limitation on the physical capacity of New Mexico reservoirs. Ok. Br. at 6. Article IV(b) does not use the word "capacity" at all; therefore, Oklahoma must be relying on the phrase "portion of the capacity of reservoirs available for the storage of water" in Article II(d) to support its "plain reading" claim.[3] To the contrary, that phrase does not suggest a limitation on the size of a reservoir. What it contemplates is that a reservoir may have different "portion[s] of the capacity" available for storage of water allocated to different purposes. What Oklahoma attempts to do, however, is to take the word "capacity" out of con-

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[2] Oklahoma says that there is "not less than" 245,000 acre-feet of capacity located below Conchas Dam, citing the Report's remark that there is "about" that much physical capacity below Conchas. Ok. Br. at 15; Report at 36. Based on the 1983 capacity survey of Ute Reservoir, there is 242,500 acre-feet of capacity located below Conchas Dam, excluding dead storage but not excluding accumulated sediment in reservoirs other than Ute. If such sediment were deducted, the figure would be lower. *See* Agreed Material Facts E10, E21, F3.

[3] Article II(d) of the Compact says:

> "The term 'conservation storage' means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them."

text, treating the phrase as if the words "that portion of" did not exist. There is no reason to ignore this Compact language. In fact, Article II(d) directly contradicts Oklahoma's position, because it allows for "portion[s] of" capacity to be devoted to exempt purposes, such as sediment control. Thus the Compact recognizes that reservoirs will be built that are larger than conservation storage limitations.[4]

Oklahoma implicitly admits that the Compact allows construction of excess reservoir capacity for flood control, power production and sediment control. Ok. Br. at 10 ("capacities allocated solely to flood control or power production could be used to temporarily store [other] waters"). Oklahoma makes this implicit admission in discussing Article VII of the Compact, which permits New Mexico, with Commission approval, to store water in excess of its Article IV limitations.[5] Oklahoma fails to recognize, however, that this admission destroys the logic of its position on the capacity issue. If New Mexico's reservoir capacity is limited to 200,000 acre-feet, then there will never be available capacity for Article VII waters. If New Mexico is permitted under the Compact to build excess capacity—designating it as flood control or power production—in order to accommodate Article

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[4] Oklahoma's use of a "plain reading" argument is ironic in the light of its re-wording of the language of the Complaint and Article IV(b) of the Compact by omitting the "originating" language appearing in both documents. *See* Ok. Br. at 4; *compare id. with* Complaint at 4 (¶9) (April 16, 1987) (discussing Article IV(b)).

[5] The Report finds that Oklahoma's capacity interpretation would make Article VII meaningless as far as New Mexico is concerned. Report at 38.

VII waters, then the Compact does not limit reservoir capacity. Thus Oklahoma contradicts its own argument.

As the Report finds, not only Article VII but other provisions of the Compact contradict Oklahoma's position on the capacity issue, equating the conservation storage term with storage of water. Compact Arts. IV(c), VII, VIII; *see* Report at 37-39. The Report finds that "looking solely to the face of the Compact, nothing justifies treating the New Mexico 'conservation storage' limitation differently from the Texas stored water limitation, and other provisions of the Compact treat both limitations as ceilings on stored water, not reservoir capacity." *Id.* at 39. Article IV(c), in fact, is part of and supplemental to the Article IV(b) apportionment. It is fundamental that the different provisions of a contract or a statute must be construed together, as parts of a workable and harmonious whole. *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 837 (1988); *Avedon Corp. v. United States*, 15 Cl.Ct. 771, 776 (1988); *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988). The only harmonious reading of the Compact is that it applies to storage of water, not total reservoir capacity.

Oklahoma looks to the negotiating history of the Compact to bolster its claim that the Compact limits reservoir capacity. The main focus of the Oklahoma analysis is Article IV of the December 5, 1950 draft of the Compact, in which the limitations on New Mexico's storage of water in previous drafts of the Compact were replaced by a limitation on "storage capacity." There is no basis for Oklahoma's unsupported assertion that the phrase "storage capacity,"

as it appears in the December 5 draft, means the same thing as the capacity of reservoirs, rather than water storage volume. Moreover, as with the Compact itself, other provisions of the December 5 draft are in conflict with Oklahoma's understanding, and those provisions make clear references to New Mexico's storage of water. *See* N.M. Ex. 30, Ex. F at Arts. III and VII (December 5 draft provisions applying to New Mexico's impoundment of "more water than the amount set forth in Article IV" and each State's provision of "accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact").

Oklahoma concedes that in all the early drafts of the Compact, New Mexico's limitation was on waters in storage, not on the physical size of reservoirs. Ok. Br. at 12. Oklahoma also concedes that at least part of the language on which it relies in the December 5 draft was deleted from the final Compact. *Id.* Thus the thrust of Oklahoma's negotiating history argument is that, although the negotiators consistently agreed that the limitation on New Mexico was in terms of waters in storage, they made a sudden radical change on the day before they signed the Compact, without discussion or explanation, the effect of which was to reduce New Mexico's storage rights significantly. Then, in the final Compact, they deleted some of the language which supposedly accomplished this change, but they still intended the deleted language to have effect. This simply is not plausible.

The more plausible understanding is that no negotiator at any point contemplated that total reservoir capacity in New Mexico would be limited, because such a limitation would be practically unworkable for

the reasons given above. Instead, the negotiators worked in the context of the Article II(d) phrase "that portion of the capacity of reservoirs," which appears in identical language in all drafts of the Compact. N.M. Ex. 30, Exs. A, B, C, F. Thus when the negotiators discussed "storage capacity" in the December 5, 1950 draft, they were not limiting the size of reservoirs, but limiting "that portion of" reservoirs which could be devoted to conservation storage. This understanding makes all Compact drafts consistent in regard to the capacity issue, giving every draft a uniform waters-in-storage meaning with respect to conservation storage. Therefore, Oklahoma's argument concerning its supposed "plain reading" of Articles II(d) and IV(b) is belied by the very history Oklahoma advances in support of its cause. Ok. Br. at 6.[6]

The Report correctly finds that the Compact applies its limitations to water in storage, not reservoir capacity. Oklahoma never explains why a reservoir capacity limit, which leads to absurd consequences, should have been chosen by the negotiators when, as Oklahoma admits, a much more feasible water-in-storage limitation would do just as well. *Id.* at 8. Oklahoma's position is incorrect and contradictory. The Report correctly rejected it.

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[6] Contrary to Oklahoma's argument, the Raymond Hill memorandum contradicts the capacity interpretation, because Hill was discussing conservation storage which is provided by allocation of storage in a "portion of reservoir capacity." Article II(d); *contrast id. with* Ok. Br. at 13-14.

II. Texas Is Incorrect, and Attempts to Prejudice New Mexico, in Arguing that the Record Is Sufficient for the Court to Decide the Desilting Pool Issue

A. Texas Is Incorrect that the Court Should Decide the Desilting Pool Issue on the Current Record, but if the Court Does Decide the Issue, New Mexico Should Prevail

Texas objects to the Report's recommended referral of the desilting pool question to the Commission, both on the merits of the issue and as a matter of procedure. Texas Brief at 2-8 (December 20, 1990) ("Tx. Br."). The desilting pool issue will be mooted if the Court decides in favor of New Mexico's exception on the "above Conchas" issue. If not mooted, the desilting pool issue should be referred to the Commission for further factual development, as the Report recommends. If the Court does not refer this issue to the Commission, the matter should be remanded to the Master for an evidentiary hearing. If the Court reaches the merits of the question, New Mexico should prevail.

The Report characterizes the desilting pool issue as "the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance." Report at 97. Rather than clearcut questions of Compact interpretation appropriate to this summary judgment proceeding, the desilting pool issue involves facts and engineering judgment. *See* N.M. Exs. 73, 75; Tr. at 28-30 (June 19, 1990). Until the Master's Draft Report, however, the parties had focused on Compact interpretation rather than questions of engineering. This was the reason the Special Master chose not to decide the desilting pool matter on cross-motions for

summary judgment, but to refer it to the Commission for further consideration and development of a record. *See* Report at 97-98. The Special Master correctly found that the matter needed further development. The Court should *a fortiori* decide likewise.

Texas has presented no argument—apart from an assertion that it will be harmed by delay in the disposition of this issue—as to why the procedure recommended by the Report should not be followed. Instead, Texas argues that the Court should reach out, despite the absence of an initial determination by a fact-finder with expertise in these matters, and decide the merits of the desilting pool issue in the plaintiffs' favor. This would deprive the Court of the benefit of further factual development on a fact-intensive, technical issue.

No purpose is served by preventing the development of a full record on this issue. Texas' claim that it is harmed by delay is not justified. Texas has not alleged, and will not suffer, irreparable harm. Texas has not needed the approximately 25,000 acre-feet of water in the Ute Reservoir desilting pool because of the hundreds of thousands of acre-feet of water available to it in Lake Meredith. *See* Report at 9. An incorrect decision against New Mexico on the basis of an inadequate record, however, would harm New Mexico.

Texas' attempt to avoid the development of a complete record on this issue underscores the fact that New Mexico is correct on the merits. The uncontradicted evidence in this case is that the use of a desilting pool at Ute Reservoir is a reasonable and necessary approach to sediment control, given the

characteristics of the reservoir and the needs of the water supply project planned from that reservoir. N.M. Ex. 75; Pls. Ex. 98g at 47 (Tr. of Twenty-Sixth Annual Meeting, Canadian River Commission, March 6, 1984).

The dead pool at Ute Reservoir, which is exempt from conservation storage under the Compact, can serve as a sediment control pool. Because one of the chief sediment-bearing tributaries to the Canadian River empties into Ute Reservoir a short distance upstream from Ute Dam, however, the dead pool at Ute is insufficient to provide adequate sediment control. A sediment control reservoir that is separate and upstream from the main reservoir is also an ordinary engineering technique which would be unquestionably permissible under the Compact. *See* Report at 96. There is no feasible site upstream for a sediment control reservoir separate from Ute Reservoir. Therefore, New Mexico has designated a portion of the reservoir above dead storage to provide sediment control. New Mexico's desilting pool is a reasonable engineering and economic means of sediment control within the meaning of Article II(d). *See* Tr. at 153-56 (Nov. 1, 1989).

Texas is also incorrect that New Mexico's designation of a desilting pool is premature. Texas wrongly suggests that "prospective customers have lost interest" in the Eastern New Mexico Water Supply Project, the municipal water supply plan for which the desilting pool is intended. Tx. Br. at 4, citing Report at 91. In further proceedings before the Commission or the Master, New Mexico can show that the option contract which the Report notes as having expired recently was re-contracted almost immediately. The

cities in this project cannot afford to lose interest in a future water supply. New Mexico cities are concerned about the exhaustion of the Ogalalla underground aquifer which serves the area, just as are their neighbors across the state boundary in Texas, who use the same aquifer. As the groundwater supply decreases, the need for surface water will become acute. Both states recognize the inevitability of this increasing need. *See* N.M. Ex. 73 at 6 (1990 Bureau of Reclamation report to Canadian River Commission discussing current and future need for municipal water supply in eastern New Mexico). Thus, the interest of the two states in the municipal use of the water is essentially equivalent.

The issue of need, therefore, does not concern the need for water from the Canadian River, but whether the fact that the delivery system for the Eastern New Mexico project is not yet under construction means that there is no need to store water now. Texas argues that New Mexico should release the water now and rely on the potential supply from erratic flood flows to supply municipal demands when the project is built.[7] Such a requirement would harm New Mexico through the accelerated encroachment of sediment into the space required for the desilting pool, to the detriment of the municipal water supply. In order to avoid the unnecessary risk of that harm, a desilting pool is needed now, and the establishment of that pool is not premature.

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[7] Although the Bureau has estimated that completion of the Eastern New Mexico project will take seven years, portions of the project to nearby communities could be completed much sooner. *Compare* Pls. Ex. 142 *with* N.M. Ex. 73.

B. Texas' Argument on the Desilting Pool Issue Contains Misleading Factual Assertions that Prejudice New Mexico

Texas also makes misleading factual assertions which, if not corrected, will prejudice New Mexico. For example, Texas declares that "[t]he controversy over New Mexico's claimed exemption of the water in [the Ute Reservoir] desilting pool began with the commencement of the enlargement of Ute Reservoir in 1982." Tx. Br. at 5. Texas then describes the discussions that went on between 1982 and 1987, and completes the paragraph with the assertion that "[t]hroughout all of this controversy, New Mexico has treated the pool as exempt and withheld the water from the downstream states." *Id.* This assertion is seriously misleading for two reasons.

First, although New Mexico has always believed, and continues to believe, that the desilting pool is permissible under the Compact, New Mexico's storage of water in the pool could not have violated the Compact until 1987, when water spilling from Conchas Dam filled the available storage capacity in Ute Reservoir. Before 1987, New Mexico had never attained 200,000 acre-feet of water storage in the basin below Conchas Dam, and thus could not possibly have violated Article IV(b), either through the claim of a desilting pool or by any other means.[8] Thus, to the

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[8] New Mexico was holding water in Ute Reservoir pursuant to a contract with the State Game Commission prior to 1982, but the total amount of water in storage was less than 109,000 acre-feet. Report at 16. In 1984, when the enlargement of Ute was completed and the enlarged reservoir began to fill, the operating criteria which established the desilting pool were promulgated. The total amount of water in storage at Ute Reservoir did not exceed 200,000 acre-feet until the spills of floodwater

extent that Texas asserts that New Mexico had an obligation to release desilting pool water prior to 1987, Texas does so misleadingly.

Second, the desilting pool issue may be mooted by the Court's decision on New Mexico's exceptions regarding the above-Conchas issue. If New Mexico prevails in its exceptions, no water originating above Conchas Dam will be chargeable to New Mexico under Article IV(b). In that event, the total amount of Article IV(b) water will be so far below the 200,000 acre-foot limitation that the water in the desilting pool cannot be in violation of the Compact. *See* New Mexico's Brief in Opposition to the Oklahoma and Texas Motion for Leave to File Complaint, Apps. A and B (June 25, 1987); New Mexico's Answer at 9 (Aff. Def. 2) (December 4, 1987).

Texas wrongly asserts that New Mexico claims exemption for the desilting pool "because" it is actually being maintained as a minimum recreation pool under the State Game Commission contract, so that New Mexico will be able to receive recreation benefits as well as 200,000 acre-feet of conservation storage. Tx. Br. at 5. This characterization of New Mexico's intent is without foundation. The citation in Texas' brief to the Report supports only the existence of the contract. *See id.*, citing Report at 90. There is no basis for the plaintiff's prejudicial accusation that the desilting pool is a subterfuge to protect the recreation pool established under that contract. Recreation benefits from Ute Reservoir are incidental to the mu-

from Conchas Dam in the spring of 1987 occurred, one of the events precipitating the "above Conchas" issue of this lawsuit under Article IV(a) of the Compact. *See* Agreed Material Facts F6, F7, F10.

nicipal and industrial purposes which were the reasons Ute Dam and Reservoir was constructed. *See* Report at 92-93, 102, 105, 106-07; Pls. Ex. 51 (1962 approval of 1960 water rights application for Ute Reservoir).

Moreover, the reason given for the supposed subterfuge—the assertion that recreation benefits from the storage of water at Ute Reservoir have been "very lucrative" for New Mexico—is false. Tx. Br. at 5, citing Pls. Exs. 121-125. The two economic analyses of recreation benefits from Ute Reservoir that were submitted to the State Engineer prior to the decision to enlarge Ute Dam are Plaintiffs' Exhibits 124 and 125. These exhibits, on which Texas relies to demonstrate the lucrative benefits from Ute Reservoir, are economic projections rather than actual data and, in any event, do not support the proposition that the recreation aspects of the project are profitable. The first analysis showed that only about $391,000 annually in increased recreation revenues might be expected as a result of the total enlargement of Ute Reservoir from 109,000 acre-feet to 272,800 acre-feet. Pls. Ex. 124 at 5. Annual project costs of $843,000 were more than double the project benefits, resulting in a cost-benefit ratio of 0.46, a negative result. *Id.* at 11. The second analysis increased the estimated annual recreation benefits to be expected from the Ute Dam enlargement to a total of $547,500. Pls. Ex. 125 at 4. With costs remaining the same, the cost benefit ratio changed to a still-negative 0.65. *Id.* Both of these analyses were asserting recreation benefits attributable to the entire expansion of the reservoir. The benefits attributable only to the desilting pool are considerably less. Thus, the plaintiffs are incorrect to suggest that recreation benefits flowing from the

desilting pool were so lucrative to New Mexico that it was worth New Mexico's while to invent a spurious legal theory to protect those benefits by claiming that the water was needed for sediment control purposes. As shown above, the water is in fact needed for sediment control purposes.

Finally, Texas claims that the amount of water impounded in Ute Reservoir, and the extent of New Mexico's violation, has been "considerably greater" than the Report's finding as of June 23, 1988. Tx. Br. at 1. The agreed facts cited by Texas do not include deductions for exempt water storage categories such as the desilting pool, sediment in the small reservoirs below Conchas Dam, or sediment deposited in Ute since the 1983 survey. Nor does the assertion made by Texas take into account the significant releases from Ute Reservoir made by New Mexico for operational purposes since 1987, releases of which plaintiffs are aware but which are not yet of record, because the current phase of the litigation does not concern damages and remedies. If necessary in the future, New Mexico will show that these post-1987 releases have reduced or eliminated any claimed damages to plaintiffs. Until that time, Texas' assertions should be disregarded.

Texas' claim as to the extent of New Mexico's supposed violation demonstrates that Texas agrees with New Mexico that the table set out in the Report at 111 does not provide an adequate basis for determining New Mexico's violation, if any, of the Compact. Tx. Br. at 1. Texas argues that New Mexico violated the Compact to a greater extent than that shown in the Report. New Mexico believes it can show a lesser violation or none. *See* New Mexico Brief at

42-44 (December 20, 1990) ("N.M. Br."). The parties agree, however, that the figures shown in the Report do not provide a basis for Paragraph 9 of the Recommended Decree, which purports to quantify a violation. Therefore, Paragraph 9 should be deleted, even if the Report's recommendations on other issues are accepted.

III. The Parties Agree Concerning Certain Aspects of the Report's Procedural Suggestions. Texas is Incorrect, However, in Failing to Acknowledge the Benefit of Primary Jurisdiction for Technical Issues. Texas' Request for Sanctions Against New Mexico is Wholly Baseless

The plaintiffs and New Mexico apparently agree concerning the Report's suggestion that certification of good faith negotiation should be a prerequisite to the invocation of original jurisdiction. All parties argue that this suggested procedure is potentially burdensome and counterproductive. The parties also agree that, in the event that a compact commission hears an issue in the first instance, the Court should undertake a *de novo* review of the issues, rather than being limited to the record of proceedings before the Commission.

New Mexico disagrees, however, with the Texas contention that the doctrine of primary jurisdiction never should be employed in compact cases. As New Mexico has discussed, the exercise of primary jurisdiction in the Commission may be very helpful to the Court where the issues call for technical expertise. N.M. Br. at 48-50. Thus, New Mexico agrees with the Report's recommendation that the technical issues concerning the desilting pool should be referred to the Commission for decision in the first instance.

Texas asserts that referring the desilting pool issue to the Commission for consideration and fact-finding would unfairly delay vindication of Texas' claimed rights. Tx. Br. at 7, citing a Special Master's decision in *Kansas v. Colorado*, No. 105, Original (filed March 3, 1986). The principle reason for the decision cited by Texas appears to have been Colorado's repeated use of its veto to frustrate Arkansas River Compact Administration fact-finding. The Special Master in that case expressly found that Colorado had acted in good faith in doing so. *See* Tx. Br., App. B at B-10. New Mexico has never attempted to frustrate Commission fact-finding, and there is no basis for assuming that it would do so. In fact, New Mexico believes that the Commission is "precisely the meeting place where intentions can be communicated and negotiations entered into." Tr. at 232 (June 19, 1990).

In the course of the Texas discussion of good faith, Texas requests that the Court levy sanctions against New Mexico. Texas provides neither argument nor citation to support this request. The only possible basis for such an award is the Report's remark that New Mexico "appears to have been a reluctant participant" in Compact discussions. Report at 37. The Report does not recommend sanctions, and its comment that New Mexico appeared to be reluctant at one point is an obviously inadequate basis for sanctions. Reluctance is not the same as bad faith.

Moreover, the Report's suggestion that New Mexico was reluctant to discuss the issues is inaccurate. *See* Pls. Ex. 98g at 36-56; *see generally* Pls. Ex. 98e (Tr. of meeting of Texas, Oklahoma, and New Mexico representatives, September 29, 1982). New Mexico has not delayed appropriate Commission action. It was

Oklahoma which first asserted that further discussions before the Commission would not be helpful. *See* Pls. Ex. 98g at 40-41. The primary Commission action vetoed by New Mexico was a resolution setting forth Texas' and Oklahoma's ultimate legal position on the enlargement of Ute Dam and other subsidiary issues, with which New Mexico disagreed. *See* Report at 22. It hardly amounts to bad faith, or unreasonableness, to vote against Commission expression of a legal position that New Mexico believed to be incorrect. The Report agrees with New Mexico's assessment that the plaintiffs were wrong on the capacity issue. Therefore, sanctions are inappropriate.

The matter of sanctions was not raised by the pleadings and is not germane to the issues. There is no basis for sanctioning New Mexico or any other party. The eleventh-hour claim made by Texas should therefore be rejected by the Court.

CONCLUSION

For all the above reasons, the Court should reject the separate exceptions made by plaintiffs to the Report, while sustaining New Mexico's exceptions to the Report. The Court should enter New Mexico's Proposed Decree. N.M. Br., App. B. at 9a-11a. If further consideration of the desilting pool issue is not mooted by the Court's decision on the "above Conchas" issue, the Court should adopt Paragraph 10 of New Mexico's Proposed Decree. *See id.* at 10a-11a. No sanctions or costs of any kind should be assessed.

Respectfully submitted,

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CLERK

Supreme Court of the United States

October Term, 1990

STATE OF OKLAHOMA AND
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

REPLY OF THE STATE OF OKLAHOMA TO NEW MEXICO'S EXCEPTIONS TO SPECIAL MASTER'S REPORT AND BRIEF IN SUPPORT

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REPLY OF THE STATE OF OKLAHOMA TO NEW MEXICO'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

Oklahoma adopts by reference and as its reply to New Mexico's Exceptions to the 1990 Report of the Special Master, the Reply of Co-Plaintiff, the State of Texas, to New Mexico's Exceptions to Report of the Special Master.

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BRIEF IN SUPPORT OF OKLAHOMA'S REPLY

Oklahoma adopts, by reference and as its Brief in Support of its Reply to New Mexico's exceptions to the 1990 Report of the Special Master, the Brief in Support of Reply of Co-Plaintiff, the State of Texas, to New Mexico's Exceptions to Report of the Special Master.

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IN THE
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October Term, 1990

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STATE OF NEW MEXICO,
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TEXAS' REPLY TO EXCEPTIONS OF NEW MEXICO

Texas replies to the Exceptions to the Special Master's Report filed by New Mexico on December 20, 1990. Although New Mexico's pleading is titled "Exceptions to the Special Master's Report," no exceptions are actually designated therein. The pleading states that New Mexico excepts to Chapter VII and the Recommended Decree of the Special Master's Report. NM Exceptions at 1. Therefore, in this Reply and in the supporting brief which follows, Texas will consider argument headings I through III in New Mexico's pleading as exceptions and argument heading IV as comments.

In the supporting brief which follows, the Special Master's 1990 Report will be referred to as the Report.

New Mexico's Exceptions are without merit and should be denied.

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TEXAS' BRIEF IN SUPPORT OF REPLY

QUESTIONS PRESENTED

1. Whether the Report correctly interprets the language of Article IV of the Canadian River Compact which sets out New Mexico's Compact allocation.

2. Whether the record in this case establishes that New Mexico has breached the Canadian River Compact.

3. Whether Paragraphs 1, 4, and 9 of the Recommended Decree require modification.

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STATEMENT OF THE CASE

The Report accurately summarizes this controversy and correctly recounts the procedural history of the case and the background of the dispute. Report at 1-22. New Mexico adopts the Report's "facts and proceedings" stated on those pages "except as corrected in this brief." NM Exceptions at 1. In this supporting brief, Texas will address New Mexico's objections to statements made on pages 1-22 of the Report to the extent that such objections are discernible under New Mexico's individual arguments.

ARGUMENT

I.

The Special Master Correctly Determined That the Article IV(b) Limitation Applies to All Waters Below Conchas Dam in New Mexico, Other Than Diversions from Conchas Reservoir for Use on the Tucumcari Project

A. New Mexico's "direct reading" argument is inconsistent.

The record establishes that the interpretation of Article IV contained in the Report is the interpretation intended by the Compact negotiators and Congress. New Mexico's Exceptions challenging this interpretation are predicated on its argument that, under a "direct reading," the "originating" language in Article IV(a) and Article IV(b) is susceptible to only one meaning. *See, e.g.*, NM Exceptions at 3, 17 and 20. However, New Mexico's interpretation of the "originating" language in Article IV(a) is directly contrary to its interpretation of the same language in Article IV(b).

Under New Mexico's argument, the "direct reading" of the "originating" language in Article IV(a) is that it

includes waters entering the Canadian River basin in New Mexico from upstream tributaries in Colorado. In contrast, New Mexico argues that the "direct reading" of the same "originating" language in Article IV(b) *excludes* waters that have entered the basin below Conchas Dam from upstream of the dam.

New Mexico says that "the only reasonable reading of the Compact" is that Article IV(a) gives New Mexico free use of "waters originating *in that state* above Conchas Dam." NM Exceptions at 20. If this were correct, New Mexico could not use Canadian River waters that flow into the state from tributaries in Colorado because that water does not literally "originate" in New Mexico. To avoid this result, New Mexico's argument necessarily assumes that the water changes character as it crosses the Colorado - New Mexico state line and "originates" in New Mexico under Article IV and is therefore available for New Mexico's use. On the other hand, New Mexico argues that waters crossing Conchas Dam into the lower basin do not change character, but remain allocated to New Mexico without limit as "above Conchas" water under Article IV(a). However, New Mexico further argues that once water crosses the New Mexico - Texas state line, it again changes character and is no longer water "originating" in New Mexico and therefore not subject to allocation under Article IV. NM Exceptions at 20-21. These inconsistent propositions are what New Mexico tries to present as a direct reading of the Compact.

New Mexico relies on Article V of the Compact for its interpretation that the "originating" language in Article IV(a) and IV(b) excludes waters that have crossed the state line from New Mexico into Texas regardless of point of origin. New Mexico bases this interpretation on the fact that Article V makes a separate allocation of those waters to Texas after they cross the New Mexico - Texas state line. NM Exceptions at 20-21. In exactly the same manner, New Mexico's allocation of waters above Conchas Dam under

Article IV(a) necessarily ends when the waters cross Conchas Dam because Article IV(b) makes a separate and restricted allocation of the waters below Conchas Dam.

New Mexico's complaint that the Special Master "deleted" the "originating" language from Article IV, thereby supposedly rewriting the Compact, is based solely upon its disagreement with his interpretation of that language. Under the Special Master's interpretation, as water enters the lower basin via spills, releases, or other means, it "originates" in the lower basin and is therefore subject to the Article IV(b) limitation. This interpretation, unlike New Mexico's, can be applied consistently to Canadian River waters in Colorado, in the upper and lower basin in New Mexico, and in Texas.

B. The Special Master's interpretation of Article IV reflects the intent of the Compact negotiators and Congress.

The interpretation of the "originating" language in Article IV became the most significant issue in this litigation since under New Mexico's interpretation, the downstream states could no longer expect to receive Canadian River waters from New Mexico. In order to determine the correct meaning of the disputed language, it was necessary to compile and review the Compact's negotiating history and other relevant documents so that the language could be viewed in light of the surrounding circumstances. Report at 53. At the direction of the Special Master, an exhaustive record was compiled containing all relevant materials that could be located by the states. The Report reflects careful and thorough consideration by the Special Master of this record, the Agreed Material Facts, and the briefs and arguments of the parties.

The Special Master appropriately considered the intent of the Compact negotiators, as reflected in the negotiating history and other relevant documents, and

interpreted the terms of Article IV in a manner to effectuate that intent. He found that the words "waters originating" in the phrase "free and unrestricted use of all waters originating in the drainage basin of Canadian River *above* Conchas Dam" in Article IV(a) were intended to mean waters which are stored, used, or diverted for use at or above Conchas Dam. Report at 58-59 (emphasis added). He likewise found that the words "waters originating" in the phrase "free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico *below* Conchas Dam" in Article IV(b) were intended to include all waters reaching the mainstream of the Canadian River below Conchas Dam. Report at 59 (emphasis added).

New Mexico agrees that it was proper for the Special Master to consider extrinsic evidence, but claims that he could only use such evidence to interpret the Compact in accordance with New Mexico's theory. (NM's Exceptions at 2, 7-8). The extrinsic evidence indicates, however, that New Mexico's interpretation is the opposite of that intended by the Compact negotiators. The goals of the negotiators for their respective states are clearly established in the record. New Mexico was interested in protecting its developments above Conchas Dam, including the Tucumcari Project, and in providing for reasonable development on tributaries below Conchas Dam, primarily on Ute and Pajarito Creeks where there was potential irrigable acreage. Report at 60, 64-65. Texas was interested in restricting New Mexico's future storage of water in order to permit adequate flows into Texas for the Sanford Project. Report at 60. Oklahoma sought the opportunity for future development of the Canadian River for municipal uses. *Id.*

The Senate report on the Compact consent legislation recognized that the interests of the three states were all served by the negotiated Compact and that it would permit the orderly development of the basin's water resources. NM Ex. 29 at 2. New Mexico received protection for existing

and authorized uses above Conchas Dam[1], including the Tucumcari Project. Report at 64. It also received an additional 200,000 acre-feet storage allocation for projects below Conchas Dam, which the negotiators agreed was sufficient to regulate the tributaries below the dam. Report at 65. The New Mexico negotiator declared that "storage capacity for all projects which may be feasible below Conchas will probably not equal the 200,000 acre foot storage limit." P. Ex. 30 at 1.

New Mexico erroneously asserts, without citation, that the Report "admits" that the negotiating history did not address spills. NM Exceptions at 28. The Report correctly determined that New Mexico negotiated for a right to develop 200,000 acre-feet of the tributary flows below Conchas Dam and that the states intended for the spills from Conchas Dam to pass to Texas. Report at 64-66. As noted in the Report, the Hill Memorandum summarizing the Compact stated that New Mexico was entitled to a reasonable amount of storage below Conchas Dam to impound the flood flows of the tributaries of the Canadian River. Report at 65. The impoundments were thus expected to be placed on the tributaries and the unrestricted mainstream would transport spills from Conchas Dam to the downstream states.

New Mexico's assertion that the Engineer Advisors did not address spills is also erroneous. NM Exceptions at 28. In formulating and evaluating criteria for Compact allocations, the Engineer Advisors included spills from Conchas Dam in their estimates of inflows into the Sanford Project (Lake Meredith) in Texas. Report at 65; *See also,* Agreed Material Fact D.16.

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[1]Texas and Oklahoma agreed that storage limitations were not necessary above Conchas Dam because the waters there had been fully developed. Report at 64. The negotiators believed, therefore, that all future water development in New Mexico would necessarily be below Conchas Dam and subject to the Article IV(b) limitation.

Representatives of the U.S. Bureau of Reclamation (Bureau) attended the meetings of the Compact Commission and participated in the meetings of the Engineer Advisors. Report at 82. The Bureau's water supply studies for the Sanford Project included outflows from Conchas Dam, as well as tributary flows downstream as sources of water for that project. Agreed Material Fact C.7. The Bureau's studies assumed that New Mexico would impound a maximum of 200,000 acre-feet of water below Conchas Dam. Report at 83-84. Waters below the dam in excess of that amount, including spills from Conchas Dam, would be available for the Sanford Project. If the negotiators had intended to reserve all outflows from Conchas Dam to New Mexico, the Bureau could not have included them in determining water available for the project.

New Mexico objects to any reliance by the Report on Bureau studies because Conchas spills were not used in the Bureau's safe annual yield calculations that were a basis for financing the project. NM Exception 24, 31. However, the safe annual yield was determined by critical drawdown estimates under drought conditions when no spills occurred. P. Ex. 102 at 62-63. However, New Mexico's objection does not detract from the significance of the Bureau's interpretation of the Compact. As stated above, the Bureau was intimately involved in the studies used to allocate waters under the Compact. It understood that outflows from Conchas Dam were available to Texas under Article V of the Compact, not reserved to New Mexico, and the Bureau relied on spills that exceeded the 200,000 acre-foot limitation below Conchas Dam flowing to the Sanford Project, in whatever year they occurred.

In addition to the material cited in the Report, other documents in the record show that spills from Conchas Dam were not reserved to New Mexico. For example, Texas' understanding of its Compact allocation was articulated by Texas Engineer Advisor Charles Stevens, who participated in the Engineer Advisors' studies and attended the

Compact Commission negotiation meetings. P. Ex. 96A at 1; 96B at 1; 96C at 1. Mr. Stevens reported to his superiors at the Texas Board of Water Engineers as to the effect of the Compact just five weeks after it was signed. P. Ex. 36 at 1. His report included a summary of the hydrologic studies made by the Engineer Advisors, including the scenarios showing spills from Conchas Dam flowing into Texas for use in that state. *Id.* at 1-3, Appendix A. Mr. Stevens concluded in his report:

> Thus, in my opinion, the net effect of the compact is to allow New Mexico to develop its water resources, as it sees fit, up to an aggregate of 200,000 acre-feet of conservation storage which restriction permits the State of Texas to plan and develop its portion of the South Canadian with full knowledge of the limitations placed on upstream development in New Mexico.

Id. at 3. Texas could not have had full knowledge of the limits of New Mexico's upstream development for planning and developing the Sanford Project or any other project on the Canadian River unless the Special Master's interpretation is correct.

To refute all of this support for the Special Master's interpretation, New Mexico relies upon a parenthetical phrase - "(not including spills)" - in a letter from New Mexico Compact Commissioner John Bliss to New Mexico Senator Clinton Anderson, transmitting copies of the Compact. NM Exceptions at 13-14, 33-34. The relevant portion of this letter is as follows:

> Under [the Compact] New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being that the total storage capacity for conservation purposes of the waters rising below the dam

> (not including spills) shall not exceed 200,000 acre feet. There are no obligations or restrictions whatsoever on the use of the waters so stored below Conchas Reservoir. Since preliminary studies indicate that less than this amount will probably be required for all feasible projects below Conchas, including Ute and Pajarito Creeks, I believe that New Mexico rights and potentialities are fully protected.

P. Ex. 28. New Mexico argues, without elaboration, that the phrase - "(not including spills)" - is conclusive evidence that the New Mexico negotiator believed that the Compact allowed New Mexico to impound all Conchas spills without limitation. NM Exceptions at 13-14; 33-34.

The meaning of this phrase is not clear. It must be viewed in context with the language in the letter stating that less than 200,000 acre-feet will probably be required for *all feasible projects* below Conchas Dam. This understanding was also expressed in another letter written that day transmitting copies of the Compact to New Mexico Governor Mabry.[2] In his letter to Governor Mabry, Mr. Bliss described the Compact as follows:

> The only limit imposed by the Compact is that total storage of waters originating below Conchas Dam, for conservation purposes, shall not exceed 200,000 acre feet. I consulted with the Bureau of Reclamation and checked the records available in this office and find that storage capacity for all projects which may be feasible below Conchas will probably not equal the 200,000 acre foot storage limit. I feel,

[2]Contrary to New Mexico's assertion, the Report does not refer to these letters as written in the same *week* but correctly refers to them as dated the same *day*. Report at 75.

> therefore, that the Compact, in effect, imposes little or no restriction on any irrigation development in the state.

P. Ex. 30 at 1. Not only does this letter not mention spills, but Mr. Bliss characterizes New Mexico's limitation as a 200,000 acre-foot storage limitation *for all projects* below Conchas Dam. It is not plausible that he would have neglected to mention storage rights beyond the 200,000 acre-foot limit in his letter transmitting the Compact to the Governor for submission to the state legislature. Report at 76. The only explanation is the one expressed in his letter, i.e. that he believed that the Compact limited all storage below Conchas Dam to 200,000 acre-feet.

These transmittal letters conclusively show that Mr. Bliss believed that New Mexico had bargained for and obtained sufficient storage for "*all* projects" that might be feasible below Conchas Dam. At that time, the only feasible reservoir projects that had been identified below Conchas Dam were on tributaries. P. Ex. 41 at 4-14, 4-15. (1953 New Mexico study on feasible projects in Canadian River basin.) The Bliss letters reflect that New Mexico's goal of protecting its potential to develop tributary waters below Conchas Dam to irrigate additional lands was fully realized by the Compact's 200,000 acre-foot allotment.

Mr. Bliss and the other Compact Commissioners adopted the Hill Memorandum as a correct interpretation of the Compact. P. Ex. 96D at 2. The Hill Memorandum states that the Compact recognized New Mexico's entitlement to a reasonable amount of additional storage for the waters of Ute Creek and other tributaries below Conchas Dam, and that 200,000 acre-feet was more than sufficient for that purpose. Report at 65. This again shows Mr. Bliss' understanding that development was planned for the tributaries below Conchas Dam. that spills would not be included in that development, and that the 200,000 acre-foot limit was more than sufficient for that purpose.

The Hill Memorandum further stated that Texas and Oklahoma recognized that full development had already been made of all waters of the Canadian River originating above Conchas Dam and that therefore there was no reason to place a limitation upon the storage of such waters. P. Ex. 38 at 3. The building of additional reservoir capacity downstream of Conchas Dam to impound waters "originating" above Conchas Dam would certainly be further development of those waters and, therefore, would be contrary to the understanding of the Compact negotiators.

All other expressions of Mr. Bliss in the record on this subject show his understanding that the Compact allowed New Mexico to construct no more than 200,000 acre-feet of storage below Conchas Dam. In October 1951, in response to an inquiry by the Bureau regarding "potential uses of water by New Mexico below Conchas Dam," Mr. Bliss replied that it would be "improper for me to make any estimates which might limit or exclude future projects permitted under the Canadian River Compact." P. Ex. 39 at 1. Mr. Bliss advised the Bureau that:

> In making a water supply analysis for the Sanford Project in Texas, it seems to me that the only safe assumption that the Bureau can make regarding New Mexico uses is that the *full 200,000 acre feet* of conservation capacity allowed by the Compact will be constructed and the water used at some point below Conchas Dam.

Id. (emphasis added).

Mr. Bliss again described his understanding of the limitation in a letter to the new Governor of New Mexico in February 1952, regarding the pending legislative approval of the Compact:

> The only restriction is that [New Mexico's] construction of new storage reservoirs below Conchas Reservoir will be limited to 200,000 acre feet of conservation capacity which all studies indicate is ample for all feasible projects below Conchas Reservoir.

P. Ex. 40 at 1.

The record therefore conclusively establishes that Mr. Bliss understood that the Compact permitted New Mexico to construct no more than 200,000 acre-feet of conservation storage below Conchas Dam and that such construction was expected to be on tributaries to the Canadian River. Mr. Bliss did not expect that spills would be included in that 200,000 acre-feet but would flow to the downstream states.

When viewed in the context of these other contemporaneous expressions, the parenthetical phrase in Mr. Bliss' letter to Senator Anderson may be understood to mean that Mr. Bliss merely meant that spills were not part of the development protection that New Mexico had sought and obtained under the Compact. Nothing in that letter or in any other document shows that Mr. Bliss understood that all spills from Conchas Dam were exclusively allocated to New Mexico under the Compact.

If, as New Mexico claims, Mr. Bliss intended that all Conchas spills should be reserved to New Mexico, that was never communicated to the other states or to the Governor or Legislature of New Mexico. Report at 75-76. Texas firmly believes that Mr. Bliss did not have any such subjective and duplicitous intent. However, if he did subjectively believe that the Compact allocated all Conchas spills to New Mexico, the Compact must be construed against that interpretation since that belief was not communicated to the other parties to the Compact. Where only one party knows or has reason to know of a conflict in

meaning, a contract will be interpreted in favor of the party who does not know of the conflict. Restatement (Second) of Contracts, Sections 20, 201 (1981); *See also United States v. Haas and Haynie Corp.*, 577 F.2d 568, 573 (9th Cir. 1978).

New Mexico cites a Senate report as showing Congressional intent to give New Mexico exclusive right to all of the Conchas spills. NM Exceptions at 14. This report does not show any such intent but only reflects the language in the Compact. NM Ex. 29 at 2. Moreover, the report recognizes that the rights granted to New Mexico under Article IV(a) of the Compact were separate and distinct from those granted under Article IV(b). This is contrary to New Mexico's arguments that its rights under Article IV(a) carry through and are superimposed on its rights under Article IV(b).

If Congress had intended that New Mexico receive the disproportionate share of the Canadian River waters that it now claims, that intent would have been evident in the Congressional records. Instead, Congress declared that the Compact's purpose was "to provide the basis for effectuating an equitable division of the use of the waters of the Canadian River" basin in the three states. NM Ex. 29 at 1. New Mexico's interpretation, under which it can capture all of the waters in the basin above Conchas Dam, all the waters in the basin below Conchas Dam that entered that basin from above Conchas Dam, in addition to 200,000 acre-feet of "other" waters below the dam, is not an equitable apportionment of the basin waters and is directly contrary to the expressed intent of Congress.

The only other document in the record that New Mexico cites for its interpretation is based upon a 1956 technical report by a lower level staff engineer in the New Mexico State Engineer Office. P. Ex. 114. In the report, the writer opines that the 200,000 acre-foot limit under Article IV(b) "evidently" does not include waters passing through

Conchas Dam. P. Ex. 114 at 1. The writer then erroneously "assume[s]" that waters passing through Conchas Dam could be impounded above the 200,000 acre-foot restriction without violating the Compact. *Id.* Since that part of the technical report was included in the New Mexico State Engineer's Biennial Report for 1954-1956, New Mexico claims that it must have been relied upon by the New Mexico Governor and Legislature when Ute Dam construction was authorized.[3] NM Exceptions at 37. Not only is there no hint in the record of such reliance, the New Mexico State Engineer's Biennial Report for 1956-1958, included reservoir spills in describing waters originating in the drainage basin *below* Conchas Dam. Report at 79.

The record clearly shows that New Mexico's present interpretation was not contemplated by anyone involved with Ute Reservoir until after the Complaint was filed in this lawsuit. *See* Report at 79-81. The controversy arose in 1982 when New Mexico claimed that water to be impounded in an enlarged Ute Reservoir would be exempt as a recreation and sediment control pool. *See* Texas' Exceptions at 5. However, New Mexico's present interpretation was first asserted in pleadings filed after this lawsuit was initiated. Furthermore, it was not until 1989, two years after this lawsuit was initiated, that the New Mexico Interstate Stream Commission (NMISC) amended its permit for Ute Reservoir to reflect the position taken in New Mexico's second affirmative defense. *Id*; Special Master's Ex. 2.

C. *The Report's recommendation would effectuate the equitable division of the Canadian River provided by the Compact.*

New Mexico's attempt to portray itself as a victim of an interpretation of the Compact that would deny it any

[3]The State Engineer issuing the 1954-1956 Biennial Report was not John Bliss, but a new State Engineer who joined the office in 1955 and had not been involved in the Compact negotiations. Deposition of Steve Reynolds, May 16, 1989, at 5-6.

share of the spills over Conchas Dam is incredible. NM Exceptions at 22, 30. New Mexico's complaint is apparently that, if it is maintaining its full 200,000 acre-feet storage allocation below Conchas Dam and Conchas Reservoir is full and spilling, New Mexico will be unable to capture those spills below Conchas Dam. In other words, even when New Mexico was enjoying the total amount that it sought and received under the Compact, New Mexico claims that it would be victimized if it could not lawfully capture excess waters spilling over Conchas Dam before they reach the Texas state line.

The Report's interpretation of Article IV would not deny New Mexico a share of Conchas spills. New Mexico and Texas could capture and use such spills *up to the amount of their respective Compact limits.* As the Report correctly notes, New Mexico's real complaint is that it might have to share some of the spills. Report at 68.

New Mexico's claim of an entitlement to all of the Conchas spills is particularly egregious since only about 1,000 acre-feet of water has been diverted from Ute Reservoir since its construction in 1963. *Id.* In contrast, Texas relies on its equitable share of the Canadian River waters to meet the municipal and industrial water supply needs of the approximately 460,000 people in the Texas High Plains. Report at 9. Any spills from Conchas Dam reaching Texas will be used to satisfy those needs.

New Mexico attempts to justify its far-reaching claims on the grounds that a "de facto" sharing of the spills from Conchas Dam would necessarily occur since New Mexico does not presently have sufficient reservoir capacity to capture all of the spills. NM Exceptions at 5, 30. New Mexico asserts that it would be "neither prudent nor economically justified" to construct additional reservoir capacity to capture Conchas spills. *Id.* at 22. The record indicates, however, that since the construction and enlargement of Ute Reservoir, the NMISC has filed

numerous notices of its intention to apply for permits to appropriate and store all surface waters of the Canadian River below Ute Dam. Report at 58. Texas and Oklahoma cannot reasonably rely upon New Mexico's unsupported assertion that it will not construct or enlarge facilities to capture the spills and other waters entering the basin below Conchas Dam.

D. New Mexico's interpretation of Article IV would nullify the Compact.

New Mexico argues for an interpretation of Article IV that would allow it to impound a substantial and inestimable amount in addition to the 200,000 acre-feet that its Compact negotiator believed would be more than needed for all feasible projects below Conchas Dam. Under New Mexico's interpretation, the 200,000 acre-foot limit under Article IV(b) would be rendered essentially meaningless and the administration of the Compact would be rendered impossibly complex and controversial.

The difficulty and controversy which would plague future accounting under New Mexico's interpretation is apparent from New Mexico's treatment of the waters now impounded in Ute Reservoir. After this lawsuit was filed and Conchas Reservoir spilled, the NMISC revised its operating criteria for Ute Reservoir to provide that it would designate which of the waters spilled or released from Ute Reservoir were waters "originating above or below Conchas Dam." P. Ex. 92 at 4. New Mexico uses its arbitrary accounting practices to claim that less than eight per cent (17,000 acre-feet) of the 232,000 acre-feet impounded in Ute Reservoir on June 23, 1988, was subject to the Article IV(b) Compact limitation. Report at 111. New Mexico accomplishes this feat by designating the conservation storage pool waters as "above Conchas" waters, which it claims are exempt, and by designating the dead storage and "desilting pool" waters as "below Conchas" waters. Since the dead storage waters are admittedly exempt and New Mexico

claims that the "desilting pool" waters are also exempt, New Mexico claims a total exemption for 215,000 acre-feet out of the 232,000 acre-feet impounded on that date.

New Mexico defends its hydrologically absurd accounting on the grounds that Article IV(a) gives New Mexico free and unrestricted use of the waters originating above Conchas Dam wherever they may be located and that therefore New Mexico may freely designate the particular pool or pools in Ute Reservoir where those waters are located. Tr. of Denver Oral Arg. at 176-77. Given this position and the fact that only about 1,000 acre-feet of water have ever been diverted from Ute Reservoir, New Mexico will retain its claimed exempt "above Conchas" waters in Ute Reservoir for the foreseeable future, thereby rendering the Article IV(b) limitation essentially meaningless even in the absence of future spills.

Not only is New Mexico's accounting for "above Conchas" waters in Ute Reservoir arbitrary and self-serving, any accurate determination of the amount of such waters would have to include hydrologic assumptions and computations using data on evaporation, channel losses, reservoir contents, reservoir inflows and outflows, and diversions and return flows. Agreed Material Fact F.16.[4] Such obviously difficult accounting is the antithesis of the largely self-executing and easily verifiable Compact limitations that the negotiators intended. Report at 61.

The many assumptions and computations required to accurately determine the amount of "above Conchas" waters in Ute Reservoir would likely generate considerable disagreement among the states. Furthermore, under New Mexico's interpretation of Article IV(a), it is not only entitled to capture all spills, releases, and seepage from

[4]Although not reflected in the Agreed Material Facts submitted to the Special Master, New Mexico agreed to the materiality of this fact by its pleading dated March 27, 1989. It had previously agreed to the content of this fact.

Conchas Dam, but all other waters entering the lower basin from above Conchas Dam. This would include return flows and seepage from the Tucumcari Project, which currently are unmeasured. An accounting for these waters, even if possible, would certainly be complicated and subject to debate.

Any attempt to make an accurate accounting for the amount of "above Conchas" waters in Ute Reservoir is further complicated by the fact that the amount would be continually changing. Attempting to characterize the waters entering Ute Reservoir from all sources and leaving Ute Reservoir by spills, releases, seepage, evaporation, or diversions, even if feasible, would require continual data compilations and adjustments.

New Mexico's complaint regarding the issue of the complexity of the accounting for "above Conchas" waters is immaterial since the Report did not rely on the complexity of the accounting under New Mexico's interpretation of Article IV in construing that article. NM Exceptions at 29-30. The Special Master determined early in the proceedings that the amount of "above Conchas" water in Ute Reservoir would become material only if New Mexico's interpretation of Article IV is adopted by the Court. Tr. of Nov. 3, 1988 Meeting with Parties at 38-39. Therefore, the complexity of that accounting will not become material unless New Mexico's interpretation is adopted by this Court.

II.

The Record in This Case Establishes That New Mexico Has Breached the Canadian River Compact

Under the Report's interpretation of Article IV of the Compact, New Mexico has maintained conservation storage in excess of that permitted by the Compact. The record developed in this case, as discussed in the Report and in

Section I of this supporting brief, supports the Special Master's interpretation of Article IV as a matter of law. Although the disputed language in Article IV(a) and IV(b) is subject to different interpretations on its face, the record of the negotiating history and other relevant documents mandates the interpretation set out in the Report.

The Report did not misallocate any burden of proof or persuasion. To the extent that Texas and Oklahoma had a burden of proof or persuasion, they met that burden. New Mexico, on the other hand, did not meet its burden of proof or persuasion on its affirmative defense.

III.

Paragraphs 1, 4, and 9 of the Recommended Decree Correctly Reflect the Report and Do Not Require Modification

Paragraph 1

New Mexico's perceived problem with paragraph 1 of the Recommended Decree is illusory. It is derived from New Mexico's erroneous interpretation of Article IV. Paragraph 1 of the Recommended Decree, like Article IV(a) of the Compact, gives New Mexico free and unrestricted use of all the waters above Conchas Dam plus diversions for the Tucumcari Project. Paragraph 2, like Article IV(b), limits New Mexico's storage of water in the lower basin. When water leaves the upper basin and enters the lower basin, it originates in the lower basin. The water then becomes subject to the limitation of Article IV(b). New Mexico acknowledges that this result is the reasonable interpretation of the Recommended Decree. NM Exceptions at 40-41.

Paragraph 4

Modification of paragraph 4 of the Decree is unnecessary since, in Texas' view, the Canadian River Commission

has an implied responsibility to act reasonably in carrying out its Compact duties and functions.

Paragraph 9

New Mexico asks the Court to delete the finding in paragraph 9 that it has violated the Compact. NM Exceptions at 42-44. This request is based on a misrepresentation about the agreement of the parties and the Special Master to defer the questions of the extent of New Mexico's violations and the appropriate remedies for those violations. NM Exceptions at 42. New Mexico asserts that the issue of the extent of its violations, which was deferred, includes the determination as to whether New Mexico breached the Compact. *Id.* New Mexico cites nothing in the record to substantiate this contention.

Early in this lawsuit, the Special Master determined that the proceedings would be divided into liability and damages phases. Tr. of April 11, 1989, Meeting with Parties at 34-35. If proceedings in the liability phase established that New Mexico had breached the Compact, it was anticipated that the case would be returned to the Special Master for a determination on damages and remedies. *Id.*

New Mexico contends that even if Texas and Oklahoma prevail on the issues in this litigation, the proceedings on remand could indicate that New Mexico has not violated the Compact. Under the record in this case, including the agreed facts, should Texas and Oklahoma prevail only on the issue of "above Conchas" water, New Mexico will have breached the Compact.

New Mexico's assertion is apparently based upon the table in the Report in which the Special Master illustrates the differences between the contentions of the parties and his own determinations. Report at 111. As New Mexico points out, the Report found that on the particular date

used in the table, the extent of its violation was only 1,800 acre-feet if the desilting pool issue is remanded to the Canadian River Commission. New Mexico contends, based upon sedimentation estimates, that the amount of water that it was impounding on that date could have been overstated by some 6,000 acre-feet. Even if New Mexico's impoundment on that date was overstated, which is contrary to the agreed facts, New Mexico has, on other dates, maintained over 246,000 acre-feet in Ute Reservoir, which is more than 14,000 additional acre-feet over the amount impounded on the date used in the table. Agreed Material Fact F.14. Therefore, unless New Mexico's interpretation of the disputed "originating" language prevails, it irrefutably breached the Compact beginning in the spring of 1987.

New Mexico further objects to paragraph 9 because it can be read to find that New Mexico has been in *continuous* violation of the Compact since the spring of 1987. NM Exceptions at 43. New Mexico contends that a future sediment survey of Ute Reservoir could show that New Mexico had not been in continuous violation of the Compact since the spring of 1987. Such a survey is outside of the record and could not, in any event, establish sediment deposition for any years preceding the survey. Furthermore, if the "desilting pool" is determined to be conservation storage, as prayed for in Texas' Exceptions, New Mexico has unquestionably been in continuous violation since the spring of 1987. *See, e.g.,* Agreed Material Fact F. 11.

RESPONSE TO COMMENTS

Response to New Mexico's Comments on Procedural Requirements

Although New Mexico did not except to Section V of the Report recommending adoption of procedural requirements for future compact litigation in the Supreme Court, New Mexico did comment on those requirements in Section

IV of its Exceptions. Its comments contain a substantial misrepresentation that must be addressed.

New Mexico contends that when it refused to negotiate a legal issue, it did not breach its duty to "make a compact work," since the Special Master ultimately agreed with New Mexico's position on the legal issue. This contention is based on the erroneous assertion that the issue that precipitated this lawsuit was whether New Mexico's Article IV(b) limitation applied to water in storage or the physical capacity of reservoirs. NM Exceptions at 45. However, the primary issue in controversy within the Canadian River Commission and which resulted in this lawsuit was actually New Mexico's claim that certain waters in the enlarged Ute Reservoir were allocated for recreation and sediment control and were thereby exempt from the Article IV(b) limitation. Report at 18 - 22; *See also* Texas' Exceptions at 5. In addition, since all litigated issues in an interstate compact dispute will customarily be "won" by one side or the other, New Mexico's position would mean that no disputes need ever be negotiated.

Despite its problems with the recommended prerequisites in general, New Mexico predictably suggests that the desilting pool issue is an appropriate issue for Commission consideration and action prior to resolution by this Court. For the reasons set out in Texas' Exceptions, the desilting pool issue in this litigation is appropriate for decision by this Court at this time. Texas' Exceptions at 2-8.

New Mexico's comments regarding the procedural prerequisites illustrate the rationalizations that states will continue to use to justify lack of cooperation, regardless of Court imposed requirements. When an upstream state takes that attitude, the only recourse for the downstream state is litigation. The Court should defer consideration of adoption of the recommended prerequisites until the appropriate issue arises in a future compact dispute.

CONCLUSION

For the reasons stated above, Texas requests that New Mexico's Exceptions be overruled.

Respectfully submitted,

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No. 109, Original

Supreme Court of the United States

October Term, 1990

STATE OF OKLAHOMA AND
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

EXCEPTION OF THE STATE OF OKLAHOMA TO REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT

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No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OKLAHOMA AND
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

EXCEPTION OF THE STATE OF OKLAHOMA TO REPORT OF THE SPECIAL MASTER

The Court ordered the October 15, 1990, Report of the Special Master filed on November 5, 1990. In this exception and supporting brief, the report will be referred to as the 1990 Report.

Oklahoma adopts by reference the exceptions of the co-Plaintiff, the State of Texas. Subject to those exceptions, Oklahoma accepts the 1990 Report, except for the one matter presented within this Exception to Report and Brief in Support.

Oklahoma objects to the 1990 Report determination that the Article IV (b) Canadian River Compact limitation on "conservation storage" in New Mexico should be interpreted to apply to water in storage, not the physical capacity of reservoirs.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
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DECEMBER 20,1990

No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF OKLAHOMA AND
STATE OF TEXAS,
Plaintiffs,
v.
STATE OF NEW MEXICO,
Defendant.

BRIEF IN SUPPORT OF OKLAHOMA'S EXCEPTION

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, clause 2 of the Constitution of the United States, and Paragraph (a) (1), Section 1251, Title 28 of the United States Code.

STATUTE INVOLVED

Determination of the issues of this case is governed by the provisions of the Canadian River Compact ("Compact") 66 Stat. 74 (1952). Appendix A to this brief sets forth the Compact.

STATEMENT OF THE CASE

The Canadian River is an interstate river which rises in northeastern New Mexico, near Raton. From its headwaters, the Canadian River flows south, then generally from the west

to the east through New Mexico, Texas and Oklahoma. In Oklahoma, the Canadian River flows into the Arkansas River, a tributary of the Mississippi River.

By Act of April 29, 1950, Congress consented to the negotiation of a compact between New Mexico, Texas and Oklahoma for an equitable apportionment of the waters of the Canadian River. That Compact was ultimately negotiated between the signatory states, ratified by the states and approved by Congress pursuant to Act of May 17, 1952. 66 Stat. 74.

Article IV (b) of the Canadian River Compact provides that the amount of conservation storage in New Mexico available for impounding Canadian River waters below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet.

Oklahoma and Texas initiated this litigation in April of 1987 when they filed their Complaint. The Complaint stated that New Mexico was violating the Compact by possessing and maintaining "conservation storage" for the waters of the Canadian River in New Mexico below Conchas Dam in excess of the amount allowed and the limitation imposed under Article IV (b) of the Compact. In answer, New Mexico denied the Compact violation.

The Court appointed Special Master Jerome C. Muys to conduct proceedings in this cause and make report and recommendation to the Court.

In proceedings before the Special Master, the parties prepared and submitted Joint Statement of Facts, Joint Statement of Agreed Facts, Joint Statement of Disputed Facts and Joint Statement of Legal Issues. Based on those filings, the parties prepared and simultaneously submitted to the Special Master Motions for Summary Judgment on legal issues. Based on those motions, replies, oral argument, agreed material facts and exhibits, the Special Master determined the legal issues presented and prepared and filed with the Court his Report on those issues and Recommended Decree.

The Recommended Decree finds and determines, among other findings, that New Mexico has been in violation of the limitation on conservation storage provided under Article IV (b) of the Compact since the Spring of 1987 (1990 Report, p. 114). That determination was based on a finding that New Mexico has since the Spring of 1987, stored, as conservation storage below Conchas Dam, a quantity of water in excess of 200,000 acre-feet. The Recommended Decree additionally provides that this dispute be referred back to the Special Master to determine any injury Oklahoma and Texas may have sustained as a result of the New Mexico Compact violation and to recommend appropriate relief. (1990 Report, p. 114).

In reaching the ultimate finding and conclusion of Compact violation by New Mexico, the 1990 Report addresses and determines various legal sub-issues. One of the sub-issues considered and determined is that contained in Section VI of the Report, pages 35-45. This sub-issue was whether the Article IV (b) limitation on conservation storage in New Mexico was a limitation on the physical capacity of reservoirs available for conservation storage or, instead, a limitation on the quantity of water in conservation storage. The Report recommends that Article IV (b) and the limitation it imposed be interpreted to restrict quantities of water in storage, not reservoir capacity for conservation storage.

Oklahoma takes exception to this proposal. If the Court sustains Oklahoma's exception, New Mexico shall still be in violation of the Compact as the 1990 Report concluded. The nature of the violation, however, would be that New Mexico has developed and maintained conservation storage capacity in reservoirs in New Mexico below Conchas Dam in excess of the limitation imposed under Article IV (b). (See, 1990 Report, p. 36).

SUMMARY OF ARGUMENT

The 1990 Report acknowledges that the literal language of Article IV (b) of the Compact, read in conjunction with the

Article II (d) definition of "conservation storage," is supportive of Oklahoma's interpretation and reading of Article IV (b) that the limitation imposed is upon the capacity of reservoirs, not quantities of water in conservation storage. Notwithstanding such acknowledgements, the Report rejects that interpretation based primarily on considerations of Compact purpose, inconsistency between that interpretation and other Compact provisions and the history of Compact negotiations. The Report additionally concludes that the Texas apportionment provision, Article V of the Compact, is clearly a water in storage limitation, and there exists no basis for concluding that the Compact negotiators intended a different type of limitation, i.e., capacity, to be imposed upon New Mexico.

The basis for Oklahoma's exception is a plain reading of Article IV (b) in conjunction with the Article II (d) definition of "conservation storage," as well as consistency between that reading, Compact purposes and the history of Compact negotiations. Oklahoma additionally states that its reading of Article IV (b) is not irreconcilably in conflict with other Compact provisions.

ARGUMENT

THE COMPACT'S ARTICLE IV(b) LIMITATION ON "CONSERVATION STORAGE" IN NEW MEXICO SHOULD BE INTERPRETED TO APPLY TO THE PHYSICAL CAPACITY OF RESERVOIRS, NOT THE QUANTITY OF WATER IN CONSERVATION STORAGE.

In the instant action, one sub-issue presented is whether the New Mexico Article IV (b) Compact limitation is a limitation on the capacity of reservoirs available for impounding and retaining conservation storage waters, or is, instead, a limitation on the quantity of conservation waters which may be actually impounded and stored.

Oklahoma has advanced the view that the Compact's

Article IV (b) limitation is a capacity limitation and New Mexico has violated that provision by having constructed and maintained conservation storage capacity below Conchas Dam in excess of 200,000 acre-feet. New Mexico has taken the position that the limitation is a limitation on the quantity of water in storage, not storage capacity, and it did not have in excess of 200,000 acre-feet of water in conservation storage below Conchas Dam.

The 1990 Report acknowledges that a literal reading of Article IV (b) in conjunction with Article II (d) of the Compact is supportive of Oklahoma's capacity reading (1990 Report, p. 36). The 1990 Report goes on, however, to reject Oklahoma's interpretation and recommend that the limitation imposed be, instead, on the quantity of waters in conservation storage. Nevertheless, the Report additionally concludes that New Mexico violated the Compact by possessing in New Mexico quantities of water in conservation storage below Conchas Dam in excess of the amount allowed under Article IV (b).

Oklahoma agrees, as the 1990 Report concludes, that New Mexico violated the Compact. Oklahoma also agrees that New Mexico impounded and maintained in conservation storage below Conchas Dam quantities of conservation storage water in excess of 200,000 acre-feet. The Report conclusion with which Oklahoma takes exception is the interpretation of Article IV (b) as establishing a waters in storage limitation and not a reservoir conservation storage capacity limitation.

The capacity issue presents a question of Compact interpretation and meaning. Oklahoma concurs with the underlying approach taken in the 1990 Report for considering and resolving this issue. Oklahoma agrees that consideration should be given to the language of the Compact, both with respect to the language of Article IV (b) and Article II (d) as well as all other Compact provisions, the underlying purposes of the Compact and the history of Compact negotiations. Oklahoma concurs with the Report position that in interpreting these provisions and resolving this issue, resort may and should

be had to extrinsic evidence to ascertain Compact meaning and determine the dispute. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Arizona v. California*, 292 U.S. 341 (1934); *Texas v. New Mexico*, 462 U.S. 554 (1983). Oklahoma's exception relates solely to the conclusion reached based on a consideration of all of the factors noted in the Report.

The 1990 Report, at the outset of Section VI, page 35, correctly quotes the language of Article IV (b) and Article II (d), and correctly observes that the wording of these provisions is supportive of a capacity interpretation. The question therefore becomes whether the capacity interpretation is contradicted by, and demonstratively erroneous in light of, Compact purposes, other Compact provisions and the history of Compact negotiations.

Oklahoma agrees that two primary purposes of the Compact were and are to make secure and protect present developments within the signatory states and to provide for the construction of additional works for the conservation of the waters of the Canadian River. Oklahoma also agrees, as the 1990 Report infers, that the fundamental method chosen by the Compact negotiators for accomplishing these purposes was to limit future storage of water in New Mexico and Texas. The question presented here is whether the Article IV (b) limitation is a reservoir storage capacity limitation or a limitation on the quantity of waters actually in conservation storage. Since either limitation mechanism, *capacity or waters-in-storage*, would achieve the Compact's purpose of limiting future storage in New Mexico, Oklahoma's reading of Article IV (b) is consistent with Compact purposes. Therefore, Compact purpose cannot rationally contradict Oklahoma's interpretation.

The 1990 Report states that Article IV (b) is inconsistent with Article IV (c). The Report notes that Article IV (c) briefly specifies the conservation storage limitation on the North Canadian River in New Mexico in terms of storage of such water, and this language plainly refers to stored water and not reservoir capacity. (1990 Report, p. 37-38).

Article IV (c) of the Compact speaks to the right of New Mexico to provide "conservation storage" in the drainage basin of the North Canadian River. That right, however, is the right previously established by Article IV (b). In speaking to that right, Article IV (c) provides that the only part of the 200,000 acre-feet conservation storage capacity apportionment that can be provided in the North Canadian River Basin is specifically limited to those waters then unappropriated under the laws of New Mexico and Oklahoma.

Article IV (c) does not contradict Oklahoma's capacity interpretation of Article IV (b). Article IV (c) imposes a particular limitation which is companion and supplemental to, but nevertheless distinct from, that which is addressed and established in Article IV (b).

Having established the fundamental nature and amount of the New Mexico conservation storage apportionment within Article IV (b) as to both the Canadian and North Canadian Rivers, there would be no purpose served in re-addressing that apportionment within Article IV (c). The only purpose Article IV (c) serves is to identify and describe those waters which could be stored in the North Canadian River Basin pursuant to the conservation storage apportionment already established under Article IV (b). Accordingly, Article IV (c), addressing a distinct subject matter, is not inconsistent with Oklahoma's capacity reading of Article IV (b) and affords no basis for a contrary interpretation.

The 1990 Report additionally finds contradiction between Oklahoma's reading of Article IV (b) and Article VII of the Compact. The Report notes that Article VII authorized the Canadian River Commission ("Commission") to allow New Mexico and Texas to impound more water than amounts set forth in Articles IV and V. The Report reasoned that if Article IV (b) imposed a capacity limitation, there would never be any capacity available for New Mexico to impound surplus waters on a short-term basis with prior Commission permission, thus rendering Article VII meaningless as far as New Mexico is

concerned. (1990 Report, p. 38). This reasoning is faulty.

Article IV (b), when read in conjunction with Article II (d), as it should be, is not irreconcilable with Article VII of the Compact. New Mexico, under Article VII and with prior Commission approval, could store surplus waters in reservoir capacities exempt from the Article II (d) definition of "conservation storage." For example, capacities allocated solely to flood control or power production could be used to temporarily store such surplus waters. The 1990 Report rejects this reconciling reading, and goes further to note that Ute Reservoir has no capacity allocated to such purposes and, even if it did, such a use of available exempt storage might defeat project purposes established in the reservoir's design. (1990 Report, p. 38-39).

The Report rejection rationale is a blind alley. Oklahoma's reading of Article IV (b) should stand or fall on the basis of whether that reading is reconcilable under the Compact and its negotiating history, not on the basis of what reservoir storage capacities New Mexico, post-Compact and unilaterally, actually elected to design and construct. The fact that New Mexico subsequently designed and constructed particular reservoirs in a manner which may or may not afford them the opportunity to have exempt capacity available for a temporary impoundment and storage of surplus waters is not instructive as to the meaning of Articles IV (b) and VII, and should not be determinative in interpreting these provisions.

The 1990 Report also finds inconsistency between Oklahoma's interpretation of Article IV (b) and Article VIII of the Compact. Article VIII provides that the signatory states shall furnish to the Commission, at Commission determined intervals, accurate records of quantities of water stored in reservoirs pertinent to the administration of the Compact. The Report states that if New Mexico's limitation were a capacity limitation, the reporting of waters actually in storage would not have been required and all that would have been required to be reported was data on reservoir capacities. (1990 Report, p. 39).

The Report also concludes that since this was the only data which the Compact negotiators felt would be required to enforce Compact storage restrictions, the intended limitation must have been waters in storage and not reservoir capacity. (1990 Report, p. 44).

As in the case of Articles IV (c) and VII, supra, there is not irreconcilable inconsistency between Oklahoma's reading of Article IV (b) and Article VIII. These two provisions do not address the same subject matter. Article IV (b) establishes New Mexico's fundamental apportionment limitation. Article VIII merely speaks to a particular information reporting requirement. Article VIII states that certain records shall be furnished by the signatory states to the Commission. That requirement is not preceded by any language inferring a Compact negotiators' conclusion that such information was all that would be necessary to enforce Compact limitations.

Notably, Article VIII first appeared in the October 13, 1950, draft Compact. At that point in time, the New Mexico apportionment limitation was specifically expressed in terms of waters-in-storage. The December 5, 1950, draft of the Compact included the same reporting requirement with only a slight change in the final wording of the provision describing the reservoirs subject to the requirement. As the 1990 Report notes, the waters-in-storage limitation on New Mexico was changed to a capacity limitation in the December 5, 1950, draft of the Compact. (1990 Report, p. 41). The final limitation version of Article IV (b) did not contain language expressly keyed to stored water such as was contained in pre-December 5, 1950 versions. Any seeming inconsistency here can be explained by the timing of the eleventh-hour decision of the Compact negotiators to change the fundamental nature of the apportionment limitation imposed on New Mexico.

Contrary to the 1990 Report reasoning and conclusion, the history of Compact negotiations supports Oklahoma's capacity interpretation.

Prior to the December 5, 1950, draft of Article IV, the New Mexico limitation was a waters-in-storage limitation. In the December 5 draft, the limitation was changed to a capacity limit. That change is undeniably evidenced by inclusion of two (2) phrases in Article IV in the December 5 draft:

> (1) ". . . subject to the following *limitation upon storage capacity . . .*, and
> (2) . . . amount of conservation *storage . . . available for impounding* . . . waters . . . shall be limited to . . ." (Emphasis Added, P. Ex. 38, Ex. F. Attachment, p. 2)

In the agreed December 6 version of Article IV, the Compact negotiators, in respects relevant here, did the following. First, the introductory wording of Article IV as it appeared in the December 5 draft was revised to separately state New Mexico's entitlement to the use of waters above Conchas Dam. Given the nature of that revision, the limitation upon capacity wording which appeared in the December 5 draft would logically be deleted from the revised first paragraph. In the December 6 version, this provision became sub-paragraph (a) of Article IV.

Second, the negotiators in the December 6 draft took what was previously the entirety of Article IV, made editorial revisions to accommodate the new December 6 sub-paragraph (a) language and made the provision sub-paragraph (b) of Article IV. In rewording sub-paragraph (b) to accommodate the revised wording under sub-paragraph (a) of Article IV, the negotiators retained the language "New Mexico shall have free and unrestricted use of all waters," inserted the language following that wording "originating in the drainage basin of the Canadian River in New Mexico below Conchas Dam," inserted the phrase "provided that" and then simply picked up the balance of the previous language of Article IV (a) with the exception that the word "those" was changed to the word "these" and the phrase "of the Canadian River" was deleted.

Third, the negotiators added sub-paragraph (c) to Article IV. This additional sub-paragraph (c) merely stated that, as to the New Mexico right to provide conservation storage in the drainage basin of the North Canadian River, that right would be further limited to storing only those waters which are, at the time, unappropriated under the laws of New Mexico and Oklahoma.

From the face of the pre-December 5 Compact drafts of Article IV, the December 5 draft, and the adopted December 6 draft of that same Article, it is clear that the Compact negotiators, in arriving upon their final version of Article IV, did not change the capacity limitation established in the December 5 draft. While the final version did exclude the words "limitation upon storage capacity," that deletion was clearly for editorial purposes only. By retaining mention of conservation storage "available for impounding" waters in the final version of Article IV, the Compact negotiators clearly left intact the capacity limitation established in the December 5 draft.

The Raymond Hill memorandum supports Oklahoma's reconstruction. Hill explains the development of Article IV as follows:

> "It was recognized that New Mexico was entitled to provide a reasonable amount of *storage to impound* the flood flows of Ute Creek and other minor tributaries of the Canadian River entering the stream below Conchas Dam and above any contemplated storage works on the Canadian River in Texas. It was agreed that *a total of 200,000 acre-feet would be sufficient to provide regulation of these tributaries and leave a reasonable margin for storage of* any of the *waters of North Canadian River*

> which might be *unappropriated at the time* under the laws of New Mexico or of Oklahoma." (Emphasis Added, P. Ex. 38, p. 3).

In referring to "a total of 200,000 acre-feet" as being sufficient to provide regulation of Ute Creek flood flows and other minor tributaries of the Canadian River entering the stream below Conchas Dam *and* "leave a reasonable margin *for storage* of "unappropriated waters of the North Canadian River, Hill was clearly referring to 200,000 acre-feet of reservoir storage capacity available for future development.

An additional underlying consideration appearing throughout the 1990 Report's recommendation on the capacity issue is that there was no evidence to indicate that the Compact negotiators intended to treat the Texas and New Mexico Compact apportionments differently, that is, a capacity limit on New Mexico and a water in storage limit on Texas (See, for example, 1990 Report, p. 40-41). This observation is erroneous, and advances reasoning where none otherwise exists.

Even the most casual review of Articles IV (b) and V of the Compact demonstrate significant and obviously intentional contrast between the fundamental apportionment provisions intended to apply to New Mexico and Texas. Article V establishes an apportionment formula, the results of which are subject to contingencies and triggering events that may alter the Texas apportionment entitlement. See Compact, Article V (b). Article V (c) of the Compact provides for Oklahoma demands for Texas releases, and creates an Oklahoma interest and potential participation in conservation storage in Texas. Nothing comparable to this appears in Article IV of the Compact. Additionally, the Compact negotiators were obviously aware that Texas' Sanford project was to be located on the mainstem of the Canadian River and would be of much greater size than the conservation storage provision for Texas. This greater size would afford Texas the opportunity to capture erratic flood flows in the basin above the project. There was no

comparable understanding regarding the tributary reservoirs that New Mexico expected to some day construct.

CONCLUSION

In conclusion, Oklahoma states that its capacity interpretation of Article IV (b) is consistent with a plain reading of that provision, the purposes of the Compact and the history of Compact negotiations and is not irreconcilable with other provisions of the Compact. Oklahoma takes exception to the 1990 Report finding and conclusion to the contrary. Oklahoma requests that the Court's Opinion in this cause find and determine that the limitation imposed under Article IV (b) is a limitation on physical reservoir storage capacity in reservoirs below Conchas Dam rather than on the quantity of water in conservation storage in reservoirs. Interpreted in this manner, New Mexico remains in violation of Article IV (b) of the Compact by having not less than 245,000 acre-feet of conservation storage ("capacity") below Conchas Dam. (See, 1990 Report, p. 36). Oklahoma prays that decrees such as may be made by the Court reflect this interpretation of Article IV (b) as well as New Mexico's violation of that provision.

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December 20, 1990

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexcio and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and

industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food

and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the

three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualifed independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper admin-

istration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States. The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the United States of America

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New Mexico excepts to Chapter VII and the Recommended Decree of the Special Master's Report (October 15, 1990) ("Report").

STATEMENTS OF FACTS AND PROCEEDINGS

This case involves the parties' dispute over the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74 ("Compact"). *See* Appendix A hereto. The facts and proceedings are stated in Chapters I, II, and III of the Report, which are adopted herein, except as corrected in this brief.

SUMMARY OF ARGUMENT

The Compact is a workable and fair document adapted to the particular physical and hydrological characteristics of the Canadian River basin. Article IV(a) of the Compact provides that New Mexico shall have "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Appendix A. Article IV(a) sets no limitation on this right of use, which includes an unrestricted right to store water anywhere in New Mexico. Thus, New Mexico may store waters which have spilled over or have been released from Conchas Dam without limitation, because those waters "originate" above Conchas Dam. Article IV(b) of the Compact provides that New Mexico shall have "free and unrestricted use of all waters originating . . . below Conchas Dam," but it imposes a limit of 200,000 acre-feet on conservation storage of these waters. *Id.* This storage limitation does not apply to floodwaters which spill over Conchas Dam, because those waters do not "originate" below Conchas. The Report recommends, however, that the Article IV(b) 200,000 acre-foot limitation should be applied to Article IV(a) waters that

spill over or are released from Conchas. *See* Report at 46-88. To reach that result, the Report deletes "originating" language from Articles IV(a) and IV(b). *See id.* at 24, 58-59. This re-writing of Article IV disrupts the allocation agreed to forty years ago by Compact negotiators, and ratified by the respective States as well as consented to by Congress. The Report thus takes from New Mexico an important right it never relinquished. New Mexico excepts to the Report's recommendation on the meaning of Article IV(a) in Chapter VII, because the Compact provides no basis for making a restriction on use, including storage, of waters originating above Conchas Dam. *See* Point I(B) *infra*.

Moreover, New Mexico disputes the validity of the analysis used by the Report to reach its conclusions. The best evidence of the Compact's meaning is the language of the Compact itself. The Compact language simply does not support the Report's conclusion on Article IV(a). *See* Report at 24. If the language of the Compact is to be disregarded, the context of the Compact must provide a clear basis for doing so. Not only do the negotiating history, contemporaneous documents, and the Congressional intent in consenting to the Compact fail to give a clear reason to ignore the Compact language, they give clear support for the use of that language. Because the negotiating context supports (and certainly can be read reasonably to support) the Compact language, that language must be given full effect as the agreement of the parties. Therefore, the Court should reject the Report's recommendation on this point. New Mexico also comments on certain provisions of the Recommended

Decree and primary jurisdiction as recommended by the Report.

ARGUMENT

I. THE REPORT INCORRECTLY DELETES THE "ORIGINATING" LANGUAGE OF THE COMPACT AND, IN DOING SO, TAKES FROM NEW MEXICO A RIGHT IT NEVER RELINQUISHED

Article IV(a) of the Compact allows New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Water that spills from Conchas Dam must necessarily have originated above the dam—it begins flowing in the drainage basin above the dam before spilling. The Compact, therefore, gives New Mexico free and unrestricted use of the spills from Conchas Dam at any location in New Mexico. This free and unrestricted use includes the unlimited right to store as much of those spills as can be captured in available capacity at Ute Dam in the basin below Conchas Dam. New Mexico never bargained away that right, and should not now be deprived of it by inference.

New Mexico's direct reading of the Compact is supported by not only the words of the Compact, but by its strategy, its negotiating history, and Congressional intent. The language of the Compact should be given its full force and meaning, and the Report's contrary recommendation should be rejected.

A. The Compact's Allocation of Water Between the States Based on Storage of Waters From Different Sources is Drastically Changed by the Report's Incorrect Legal Conclusions

The Compact establishes the law of the river for three States in the Canadian River basin in a work-

able and well-functioning manner. The Compact works precisely because it allocates water in an innovative and sensible manner between the States, by providing limits only on conservation storage of quantities of water in the two upstream States—Texas and New Mexico.

Article IV of the Compact gives New Mexico free and unrestricted use of Canadian River waters, subject only to restrictions on storage of waters originating below Conchas Dam. Leaving aside years of unusually high flood flows, New Mexico stores and uses the water that originates above Conchas Dam at or above the dam, including diversions for use on the downstream Tucumcari Project and the separate Bell Ranch. *See* Agreed Material Facts B4-B7; Bureau of Reclamation Study of Water Supply for Tucumcari Project (1967, revised 1971) at 12 (quoted in N.M. Ex. 45 at 7); N.M. Ex. 45 at 2.

Approximately every forty years, however, floods on the river have occurred, causing spills from Conchas Reservoir. The largest known floods in history took place in 1941-42, less than a decade prior to the Compact. Minor spills took place in other years of the 1940s, prior to the full development of the Tucumcari Project. The next major spill from Conchas took place in 1987, after the recent enlargement of Ute Dam. This spill amounted to about 200,000 acre-feet of water, while the 1941-42 spill was about ten times as large. Also in 1987, plaintiffs filed the current lawsuit over the alleged excess capacity created by Ute Dam's enlargement. The combination of a major spill in 1987 and the filling of Ute Reservoir provided the first instance in which the "originating"

language of the Compact became important to construction of the rights of the States.

The enlarged Ute Reservoir, completed in 1984, was relatively empty prior to the 1987 flood, and was able to capture a quantity of water equivalent to 60% of the spill from Conchas. An amount of water equal to 40% of the water spilling from Conchas spilled over Ute and went downstream to Texas. *See* Tr. at 112 (Nov. 1, 1989). Had Ute been full of water when the 1987 flood occurred, the downstream states would have received a much larger amount of the Conchas spills. Had the 1941-42 spill occurred in 1987, more than 90% of the water would have spilled over Ute and proceeded to Texas. This graphically demonstrates that when the "originating" language is given its straightforward meaning and New Mexico is allowed its right to store what water it can of Conchas spills, the result is a *de facto* allocation giving each State a part of the spills.

The negotiators appropriately settled on a storage-based method of allocation to deal with an erratic and even ephemeral river, the flows of which cannot be predicted. This approach avoided many of difficulties inherent in administration of such "streamflow" compacts as the Pecos River Compact, 63 Stat. 159 (1949), and it avoided any major controversy between the parties for well over three decades. *See also* La Plata River Compact, 43 Stat. 796 (1922); Snake River Compact, 64 Stat. 29 (1950) (two of about two dozen "streamflow" compacts); Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams* at 88, 114, 190 (U.S. Dept. Int. 1956) (texts of cited compacts).

The Canadian River Compact was not a streamflow compact. It allowed each signatory State free and unrestricted use of the water inside its boundaries, subject only to certain restrictions on storage of water in the upstream States. Storage was undoubtedly selected as the allocative mechanism because any significant use of the highly erratic flows of the Canadian could be made only after storage of those flows. Much of the usable water of the Canadian River was not base flow, but unpredictable floodwaters. The Report aptly observes, for example, that "within accepted economic and environmental constraints, it promotes Article I's stated goal of 'conservation' of the waters of the Canadian River to permit New Mexico to construct as large a reservoir as is appropriate for a site in order to capture and regulate as much of the river's flood flows as possible, which flows otherwise might be wasted and not conserved for beneficial use." Report at 39. This is precisely what took place in regard to the construction and enlargement of Ute Reservoir.

Because of these special characteristics of the Canadian River, the negotiators did not find it necessary to make any restrictions on use of streamflow in the upstream states or any guarantees of streamflow to the downstream states. The negotiators were justly proud of their innovation in this regard and the relative ease and simplicity with which such a compact could be administered. *See* Raymond Hill's January 29, 1951 memorandum to the federal Chairman of the negotiating Commission, approved by the Commission ("Hill Memorandum") (N.M. Ex. 30) at 5-6. The Report, however, erroneously and inequitably treats the Compact as one meant to guarantee a level of stream-

flow to the downstream States. This improper strategy is shown by the Report's reliance on streamflow assessments made by the Bureau of Reclamation for the Sanford Project and the supposed Congressional intent in authorizing that project. Report at 57, 83-85. The Report's remaking of the Compact allocation into one assuring a streamflow level to the downstream States requires the Report to discard language expressly set out in the Compact itself.

Rather than making an interpretation of the Compact, the Report simply re-writes the Compact by deleting the "originating" language of Article IV. This Compact revision takes away a right New Mexico never relinquished in the Compact or otherwise. There is no basis for the Report to do so. The "originating" language presumptively means something in the Compact, but under the Report it means nothing.

B. The Context of the Compact and the Legislative History Show that the "Originating" Language was Intended to Have Full Force and Effect

The Compact negotiations provide contextual background for the Compact. The evidence of these negotiations is largely in the Hill Memorandum, particularly the four major drafts of the Compact attached to the Hill Memorandum as exhibits. N.M. Ex. 30. Other important parts of the Compact's context are the negotiators' contemporaneous words describing their agreement, and the legislative history of Congressional consent to the Compact. The Compact negotiating history shows that the "originating" language of the Compact was chosen intentionally. Because the Compact's context can be read to (and in fact does) support the words used by the Compact, there is no need to search the record for indications

which would contradict the one reasonable meaning of the Compact by deleting important parts of its language. *Bone v. Refco, Inc.*, 774 F.2d 235, 241 (8th Cir. 1985); *Swanson v. Baker Industries, Inc.*, 615 F.2d 479, 484-85 (8th Cir. 1980).[1]

At the October 11, 1950 meeting of the Compact negotiators, the Engineer Advisors drafted proposed provisions and submitted these to the Commission. The October 11 draft described the rights of the States in separate sections dealing with the "North Canadian River" and the "South Canadian River" (subsequently corrected to "Canadian River"). The October 11 draft provided that "New Mexico shall have free and unrestricted use of all water in the drainage basin of North Canadian River in New Mexico," and that "[e]ach state shall have free and unrestricted use of the flow of South Canadian River and its tributaries within its own boundaries, subject to [certain] limitations on storage." N.M. Ex. 30, Ex. A at 1.

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[1] Throughout this case, New Mexico has made this point in terms of the parol evidence rule, arguing that the negotiating history may not be used to contradict or rewrite the language of the Compact. The Report answers this argument by characterizing it as "a minority view," and arguing that negotiating history may be used to interpret the Compact. Report at 48-49. The Report mischaracterizes New Mexico's position. New Mexico has never argued that the parol evidence rule excludes the use of negotiating history to determine whether the words of this Compact can be interpreted reasonably in accordance with their context. What New Mexico argues, and the Report fails to acknowledge, is that the analysis and recommendation of the Report does not "interpret" Compact language. Instead, The Report uses evidence to delete Compact language. This is improper under the parol evidence rule.

Raymond Hill's draft of October 13, 1950, suggested a more cohesive structure for the Compact by treating the rights of each State in both the North Canadian and Canadian Rivers. N.M. Ex. 30, Ex. B. New Mexico's right to impound "any of the waters of Canadian River, which originate outside of the drainage basin of North Canadian River" was limited to the capacity of all existing conservation storage reservoirs in New Mexico at the end of 1950, plus an additional 50,000 acre-feet of conservation storage "in the drainage basin of Canadian River above Conchas Reservoir," and also "[w]hatever amount of water shall be or could have been at the same time in conservation storage" in the Canadian River basin in Texas, an amount assumed to be 300,000 acre-feet "unless and until greater reservoir capacity shall be provided." *Id.* at 3-4. The October 13 draft would have allowed New Mexico 300,000 acre-feet of conservation storage for Canadian River water (regardless of origin), in addition to existing reservoirs including Conchas Reservoir in the upper basin, and an additional 50,000 acre-feet of conservation storage above Conchas Reservoir. It is inconceivable that New Mexico would have accepted, without comment, a flat 200,000 acre-foot conservation storage limit instead, unless that limit were truly restricted to waters originating below Conchas Dam. Neither the plaintiffs nor the Report have shown why New Mexico would have been so inclined.

An Assistant Attorney General for Texas prepared the next draft of the Compact, dated November 14, 1950. N.M. Ex. 30, Ex. C. This draft omitted specific descriptions of the storage limitations to be imposed. In reference to New Mexico, Article IV of the draft

declared that "New Mexico shall have free and unrestricted use of all water in the drainage basin of Canadian River in New Mexico, subject to the limitations upon storage of water" to be defined later. *Id.* at 3.

These early drafts established free and unrestricted use of Canadian River water in New Mexico, subject to certain geographic restrictions on storage. The October 11 draft restricted New Mexico's storage, in addition to existing reservoirs, to "storage *in* the drainage basin . . . above Conchas Reservoir" of 50,000 acre-feet, and an additional 300,000 acre-feet or more elsewhere. *See* N.M. Ex. 30, Ex. A at 2. The October 13 draft repeated these provisions. *See id.*, Ex. B at 3-4. The November 14 draft did not include limitations on storage in the upstream states, pending additional drafting.

At the next meeting of the negotiating Commission, the Commissioners produced a draft of the Compact dated December 5, 1950, which incorporated elements of both Hill's draft of October 13, 1950, and the Texas draft of November 14, 1950, but which differed in important respects from both earlier drafts. *See* N.M. Ex. 30, Ex. F. The December 5 draft included a new provision on New Mexico's rights and duties which gave New Mexico free and unrestricted use of all Canadian River waters "in New Mexico," subject to a restriction on storage "in New Mexico" regarding "those waters . . . which originate in the drainage basin of Canadian River below Conchas Dam." *Id.* at 2. In all these drafts, a preamble describing New Mexico's rights to use of Canadian River water "in New Mexico" was used. *See* Point I(C) *infra*.

The December 5, 1950 draft of the Compact preceded the actual Compact signing by just one day. In that draft, the first sentence describing New Mexico's rights stated that:

> New Mexico shall have free and unrestricted use of all waters of the Canadian River in New Mexico, subject to the following limitation upon storage capacity:
>
> (a) The amount of conservation storage in New Mexico available for impounding those waters of the Canadian River which originate in the drainage basin of the Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.

N.M. Ex. 30, Ex. F at 2.

Article IV of the Compact as it was signed the next day did not change the meaning of the December 5 draft. A new provision, Article IV(c), was inserted, providing an additional limitation on New Mexico's right "to provide conservation storage in the drainage basin of North Canadian River." Article IV(a), a new provision dealing specifically with waters originating above Conchas Dam, was inserted, using the language of the first sentence of the December 5 draft. Both sentences of the December 5 draft were combined to create Article IV(b) of the Compact by the insertion of the words "provided that" between the two sentences, and words referring specifically to the waters originating below Conchas Dam. The meaning of the Compact as signed on December 6 thus did not differ from the meaning of the draft considered on December 5, except with the addition of the North Canadian storage restriction, which is not at issue in this law-

suit. In both the December 5 draft and the Compact, New Mexico's right to "free and unrestricted use of all [Canadian River] waters" is limited only by a restriction on storage of "waters which originate in the drainage basin . . . below Conchas Dam."

The Report correctly states that the differences between the December 5 draft and the Compact, with respect to the use of the word "originating" in Article IV(a), are stylistic. Report at 74. What the Report fails to acknowledge, however, is that the"originating" language had a substantive meaning in the December 5 draft, which substantive meaning was carried over into the Compact. In the December 5 draft the word "originate" defined the waters to which the storage limitation would apply—those which "originate" below Conchas Dam. When the word "originating" was extended to Article IV(a) in the Compact, it guaranteed this substantive meaning of the December 5 draft, by defining the waters to which the storage limitation would *not* apply as "all waters originating in the drainage basin of Canadian River above Conchas Dam." The extension of the "originating" language into Article IV(a), therefore, was stylistic in the sense that it did not change the meaning between the two drafts. The fact that the extension was stylistic, however, does not make the language itself meaningless, and the Report is incorrect to suggest that it does.

Had the negotiators intended to arrive at the result stated in the Report, it would have required only a minor change in the December 5 draft as follows:

> (a) The amount of conservation storage in New Mexico [~~available for impounding those waters of the Canadian River which originate in the drainage basin of the Canadian River~~] below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.
>
> N.M. Ex. 30, Ex. F at 2 (Deleted language of Dec. 5 draft in brackets).

The negotiators, however, retained the origination language of the December 5 draft and extended it to describe the basin above Conchas Dam, thus assuring to New Mexico free and unrestricted use of the water originating above Conchas Dam including use and storage of that water in the basin below Conchas Dam. *See* Appendix A. It is apparent from the negotiating history, therefore, that had the negotiators intended to impose restrictions on New Mexico storage which were based on the geographic locations of storage facilities rather than the source of the water being stored, they knew very well how to do so. *See* N.M. Ex. 30, Exs. A and B. But they did not do so. The only reasonable conclusion is that they meant their words to be taken literally.

The fact that the Compact was meant to be understood on its own terms with regard to possible spills over Conchas Dam was confirmed almost immediately. The day after the Compact was signed, when the meaning of Compact provisions could be expected to be uppermost in the negotiators' minds, New Mexico Commissioner Bliss wrote to Senator Anderson of New Mexico enclosing copies of the signed Compact, and commented on the meaning of its terms in the following language: "Under [the Compact] New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being

that total storage capacity for conservation purposes of the waters rising below the dam (*not including spills*) shall not exceed 200,000 acre feet." N.M. Ex. 34 (emphasis added).

The Bliss letter is the only contemporaneous comment by one of the Compact negotiators on the meaning of Articles IV(a) and IV(b) regarding Conchas spills, and it shows that Bliss understood the "originating" language of those Articles to be intentional and clear. Plaintiffs have introduced no direct evidence to the contrary on the negotiators' intent.

Legislative history shows that Commissioner Bliss' understanding was also the intent of Congress. Senator Anderson introduced the bill in Congress, for himself and for the other five Senators from the three States party to the Compact, which became the legislation consenting to the Compact. S. 1798, 82d Cong., 1st Sess. (1951). Senate Report No. 1192, submitted by Senator Anderson, accompanied that bill and explained the Congressional understanding of the terms of the Compact. That Report expressed the will of Congress that "New Mexico is granted unrestricted use of all water originating in that State above Conchas Dam." Then the Report went on to say that "New Mexico is granted the *further right* to use all waters originating in the State below Conchas Dam and may provide *for this purpose* an aggregate storage not exceeding 200,000 acre-feet." S.Rep.No. 1192, 82d Cong., 2d Sess. at 2 (N.M. Ex. 29) (emphasis added). A clearer expression of Congressional intent would be difficult to imagine; Congress expressly differentiated "unrestricted use" of water originating above Conchas from the further right to use waters originating below Conchas, subject only to a storage

limitation for the latter purpose. A "further right" cannot be construed as a limitation on the first right, and the Report is wrong to suggest that it can be so construed.

Congress therefore approved the negotiators' choice to allocate storage of water to New Mexico based on its origin in different parts of the river basin in that State. Certainly,the intent of Congress did not negate the agreement of the parties in this respect. Therefore, the Compact itself, the objective expression of the agreement between the States, must control. Because the context of the Compact, the contemporaneous interpretation, and the legislative history all show that the language of the Compact is clear and reasonable on its face, there is no need to go behind the Compact to construe it. The Report not only erred in going behind the Compact, it also incorrectly analyzed the context of the Compact itself, as well as the will of Congress.

The States regard compacts as binding agreements and should be entitled to rely on them as such. Particularly in the current atmosphere of increased litigation between states over compact questions, the Court should give weight to the role of compacts as agreements between sovereigns which are not to be lightly disregarded or reinterpreted in the absence of changed physical circumstances, mutual mistake of fact, or other compelling concerns. The parties themselves or Congress can address newly arisen problems in compacts if they so choose. *But see* Report at 29.

Courts should be especially cautious, in construing a statute which is also a contract between States, to effectuate the objective intent of the agreeing parties. *Cf.* Wilkinson & Volkman, *Judicial Review of Indian*

Treaty Abrogation, 63 Calif.L.Rev. 601, 647 (1975) ("[i]n areas of sensitive intergovernmental relationships and in questions relating to sovereign immunity, courts have vigilantly required explicit legislative action.") The appropriate inquiry in this case is to ascertain what the negotiators did in fact arrive at as the objective expression of their efforts. It is the objective, not the subjective, intent of the parties to a contract which controls, and courts will enforce the intent of the parties as expressed in the writing of the agreement, the instrument alone being deemed to express that intention. *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982); *see Consolidated Gas Co. v. FERC*, 745 F.2d 281, 289 n.18 (4th Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Statutory construction of a compact must be integrated consistently with contract-law interpretation. Ratification of a compact by Congress ratifies the expressed intent of compact negotiators, unless Congress changes that compact. Any more "activist" role by the Court is a judicial revision of the compact under the guise of statutory interpretation, an activity repugnant to principles of wise judicial administration. It is not the function of a court to alter a contract's terms in the process of interpretation to make those terms accord with the court's sense of justice or equity. *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 947 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981); *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1013 (3d Cir. 1980). This Court, similarly, has repeatedly stated that it will not substitute its judgment for that of Congress. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 568 (1983); *Rosebud Sioux Tribe*

v. Kneip, 430 U.S. 584, 615 (1977); *Arizona v. California*, 373 U.S. 546, 565-66 (1963).

The Canadian River Compact is not only an agreement between States, it is a federal statute by virtue of the Congressional consent to the Compact enacted in 1952. However, the rules of statutory interpretation familiar to this Court in cases such as *Public Citizen v. United States Dept. of Justice*, 109 S.Ct. 2558 (1989), should reach the same result as application of the canons of contract law. In *Public Citizen*, the statutory language did not have a definite meaning and a "literalistic reading" of the Act would lead to absurd consequences. *See id.* at 2565-66, 2571. In the current case, contrary to the Report's conclusions, the Compact's "originating" language has a definite accepted meaning, and the only reasonable interpretation of the Compact does not lead to "patently" absurd consequences. *Id.* at 2575 (J. Kennedy, dissenting). *But see* Report at 52.

The Report's statutory analysis is simply not correct. The Report declares that "neither the language of the federal consent legislation nor its relatively sparse legislative history shed any light on [the Article IV(a)] issue." Report at 77. To the contrary, the Senate Committee Report that accompanied the consent legislation not only specifically stated that New Mexico's use of the water originating above Conchas Dam was "unrestricted," but also that New Mexico had the "further right" to store the water originating below Conchas Dam for use. S. Rep. No. 1192, *supra*. The Senate Committee Report is the most reliable indicator of Congressional intent except the language of the Act (in this case, the Compact) itself. *See Menominee Tribe v. United States*, 391 U.S. 404, 410

(1968); 2A Sands, *Southerland Statutory Construction* §§48.06-48.08 at 308-16 (1984). Therefore, the legislative history is not opaque on this question, and it fully supports New Mexico's view.

C. The Report Incorrectly Finds Ambiguity in Article IV(A) Because the Provision Has Only One Reasonable Meaning

The Report treats the Compact, which has no ambiguity, as an ill-drafted and ambiguous document. This is a fundamental mistake of the Report. This asserted ambiguity or absurdity is relied on to remove the unambiguous "originating" words of Article IV(a). This reliance is misplaced as a matter of law.

The Report offers four rationales for its finding that the Compact is ill-drafted, ambiguous, or absurd. First, the Report remarks that the Compact was relatively hastily drafted, implying that the language of the Compact therefore should have less force that it would if the negotiators had spend more time on it. Report at 53. This argument ignores the fact that the document was not only solemnly agreed to by the negotiators, but also reviewed, discussed, and enacted by Congress. Moreover, there is absolutely nothing to suggest that haste in negotiations had any bearing on the issues involved here. The Compact made a sensible and efficient allocation of water between the States, and the quickness with which it was negotiated is irrelevant to that allocation.

The second rationale for the Report's rejection of the Compact language is the Compact's supposed ambiguity. The Report suggests that the Compact, as written, could give New Mexico a claim on waters located in Colorado or Texas. *Id.* at 56. The Report suggests that the supposed ambiguity that results

from lack of the phrase "in New Mexico" in Article IV(a) of the Compact is so significant that the Compact cannot "bear its literal meaning." *Id.* at 48; *see id.* at 57. This is wrong both because the Compact language is not in fact ambiguous, and because the supposed ambiguity is not material to the issues of this lawsuit.

Virtually all reported decisions agree on the test for contract ambiguity; a contract that is reasonably susceptible of two or more different meanings is ambiguous. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1360 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 865 (1989); *Broad, supra*; *Mellon Bank, supra*. Under the above test, the Compact is not ambiguous because it is not reasonably susceptible of different meanings. Simply because a party later disputes the meaning of a contract does not render it ambiguous. *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 955 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1241 (1984); *International Union of Bricklayers v. Martin-Jaska*, Inc., 752 F.2d 1401, 1406 (9th Cir. 1985); *Boudreau v. Borg-Warner Acceptance Corp.*, 616 F.2d 1077, 1079 (9th Cir. 1980).

The Report does not suggest a different meaning for the "originating" language. No reasonable meaning exists apart from its ordinary meaning of "arising" or "beginning." *See* 7 Oxford English Dictionary at 203 (1933) (Originate: "To give origin to, give rise to, cause to arise, initiate, bring into existence"). Thus the Report has found no ambiguity in this language but has merely rejected it.

The Compact is clear in material respects. Unless the words used by the parties to a contract are found

to be ambiguous in some material respect, courts should give those words legal effect according to their ordinary and natural meaning. *Florom v. Elliott Mfg.*, 867 F.2d 570, 575 (10th Cir. 1989). Even if the Court finds that the lack of "in New Mexico" in Articles IV(a) and IV(c) does create an ambiguity, it is not *material* to the dispute before the Court. New Mexico does not claim rights to water in Colorado or the right to reach into Texas for water. *See* Report at 55.

As to Colorado, because only New Mexico, Texas, and Oklahoma had interests in the Canadian River waters that justified the substantial effort of an interstate compact dealing with water allocation, those three states alone were parties to the Compact. No reasonable person would expect the Colorado Congressmen to consent to a compact between three other states allocating Colorado waters. It defies common sense to suggest that the Compact might allocate water in a non-party State to one of the States signing the Compact. The only reasonable reading of the Compact, therefore, is that it addressed New Mexico's rights to Canadian River water "in" New Mexico. Congress clearly shared this understanding. S. Rep. No. 1192, *supra* (Compact gives New Mexico free use of "waters originating *in that state* above Conchas Dam") (emphasis added). *But see* Report at 55 n.38. Congress also affirmed the negotiators' clear intent to allow New Mexico use of "water originating in that State." S. Rep. No. 1192, *supra*. There is only thus one reasonable reading of "originating" on its face.

Any ambiguity is cured with respect to Texas and Oklahoma by the overriding provisions of Articles V

and VI. Article V of the Compact gives Texas free and unrestricted use of Canadian River water "in" Texas, subject to certain storage limits. This provision, when read consistently with Article IV(a), means that New Mexico has no rights to water originating above Conchas Dam once it reaches Texas, because that water is now "in" Texas and subject to Texas' rights.

A reading of the Compact based on New Mexico's supposed claim to water in Texas violates the basic canons of statutory and contract interpretation that all provisions of the Compact must be read together to result in a cohesive and meaningful whole. *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988); *Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1193 (5th Cir. 1985); *Cherry Hill Sand & Gravel Co. v. United States*, 7 Cl.Ct. 357, 360 (1985).

The Report rejects New Mexico's argument that Article V removes the supposed ambiguity of Article IV(a) with respect to waters in Texas. Report at 56. The Report asks what has become of Colorado's claims to water *in Texas*, but this question does not make sense. *Id.* The water "in" Texas which arose in Colorado is, when it reaches Texas, allocated by the Compact to Texas, and Colorado would not have a claim to it whether or not New Mexico's interpretation of Article IV(a) is upheld. Likewise, Colorado has no claim to water in New Mexico that has flowed across the Colorado-New Mexico boundary.

Article II(a) of the Compact defines the Canadian River as "arising" in New Mexico and flowing into Texas and Oklahoma. The geographic scope of the Compact was limited to those three states. Article

II(a) included all tributaries of the Canadian in its definition of that river, and even though minor parts of the tributaries of the Canadian originate outside the three states, a reasonable and common-sense construction of the Compact is that it meant to treat the Canadian River waters only to the extent the three signatory states had interests in these waters.

The Report's third rationale for ignoring the language of the Compact is the assertion that reading the Compact on its own terms gives New Mexico a "massive windfall" that Congress could not possibly have intended. *Id.* at 67. This contention is just not true. The Compact language, viewed from a practical standpoint, divides spill waters from Conchas Reservoir in an equitable way. New Mexico's storage in reservoirs below Conchas Dam of water spilling from that dam will be limited to the amount of storage capacity available below Conchas at the time of the spill. Because massive floods occur only once about every forty years, it is neither prudent nor economically justified for New Mexico to build surplus empty capacity to attempt to catch such floods entirely.

New Mexico's stake in this lawsuit is the right given to it by the Compact to capture the spills from Conchas in whatever extra reservoir capacity happens to be available at that time. The remainder of such spills would go to the downstream states. The result reached by the Report, by contrast, denies New Mexico any share of the spills over Conchas Dam under Article IV(a), in defiance of the Compact's language. Therefore, the Report is incorrect in stating that the Compact, read straightforwardly, would give New Mexico a "massive windfall." *Id.* It is the Report, in fact, which gives Texas a "massive windfall" by recommending that New Mexico be denied its Compact apportionment of the floodwaters of the Canadian River.

The fourth rationale identified by the Report is the effect of New Mexico's Compact interpretation on the potential inflow of water for the Sanford Project in Texas. *Id.* at 57-58. This effect, the Report says, "while, perhaps not 'absurd,' appears to run counter to the Congressional intention in conditioning funding of the Sanford Project on execution of the Compact and in subsequently approving the Compact." *Id.* at 57. To the contrary, the Congressional intent in imposing the conditions on funding of the Sanford Project was to protect the neighboring states' claims to an adequate water supply which might otherwise be demanded by the Sanford Project, by far the largest reservoir development in the basin. S.Rep.No. 1192, *supra*; Agreed Material Facts C3-C5. The interpretation of the Compact offered by New Mexico would clearly effectuate Congressional intent with respect to the Sanford Project, not subvert it. It is the Report which turns its back on the history of Congressional involvement in the Canadian River basin when it suggests that"there is absolutely no basis for concluding that Congress intended" that the Compact give New Mexico the rights provided by an unstrained reading of Compact language. Report at 58. Congress consented to the Compact after considering it in committee and issuing a report describing its terms, so that there is an ample basis for concluding that Congress intended what it said. *See* S. Rep. No. 1192, *supra*.

There is no support for the Report's suggestion that Congress intended that spills over Conchas Dam

should go to the Sanford Project. In fact, the Report itself concedes that "the 'safe annual yield' water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills". Report at 85 n.52. Because the Sanford Project did not rely on Conchas spills, Pls. Ex. 102 at 62-63, then Congress could not have implied any intent with respect to Conchas spills when it approved the Sanford Project.

Within two pages of this discussion, moreover, the Report refutes its own suggestion that to give "originating" any meaning would work a hardship on the two downstream states that Congress could not have intended. Commenting on the result of its recommendation to deny "originating" any meaning, and thus deny New Mexico the power to store above-Conchas water below Conchas dam without chargeability under Article IV(b), the Report remarks:

> A natural question is why New Mexico should be permitted to capture all water originating above Conchas Dam in New Mexico and put it to use above Conchas and on the downstream Tucumcari Project, but not put it to use elsewhere below Conchas Dam without chargeability under Article IV(b) *when the impact on Texas and New Mexico [sic-Oklahoma] is the same in each case*. The short answer is that such was the intent of the Compact framers and was apparently the result of negotiations based on the assessment of probable future development scenarios.
>
> Report at 60 (emphasis added).

This remark acknowledges that even under the recommendation of the Report, Article IV(a) gives New Mexico the right to build or enlarge a dam to capture all water which would otherwise spill over Conchas Dam—the only restriction is that this new dam or enlargement must be built at or above Conchas, rather than below it. But the impact on Texas and Oklahoma is the same, no matter where the dam or enlargement is located. In other words, the Report's revision of Compact language gains nothing for the downstream states. Whether the Compact is read according to its terms or rewritten to eliminate the "originating" words, there is no "massive windfall" to New Mexico.

Whether New Mexico wins or loses, it has the right under the Compact to prevent any flood water originating above Conchas Dam from reaching Texas and Oklahoma, by building a new dam and holding it empty in order to capture that floodwater. As discussed above, however, New Mexico will not build an empty dam to capture forty year floods, either in the upper or the lower basin. That is the relevant "probable future development scenario." The overwhelming likelihood—as the negotiators can be presumed to have known—is that New Mexico will capture what it can of floodwater in whatever capacity happens to be empty at the time, and the remainder will go to the downstream states. This is a workable and fair result. It gives all states a share in the floodwaters. It is also, unlike the Report's recommendation, in accordance with the straightforward meaning of the words used in the Compact.

The Compact as it is written is clear, workable and fair to the parties. The fact that the plaintiffs now argue for a different division, one which they claim

is more fair, in which they should get almost all Canadian River floodwaters and New Mexico little or none, is not grounds to rewrite the language agreed upon. As this Court declared in *Texas v. New Mexico, supra*, 462 U.S. at 568, citing *Arizona v. California, supra*, 373 U.S. at 565-566: "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment for the apportionment chosen by Congress.' "

Because there is only one *reasonable* meaning of the Compact, there is no ambiguity. Because there is no ambiguity, the words referring to water "originating above Conchas Dam" should be read to mean what they say and should not be deleted by resort to unclear extrinsic evidence. *See Trujillo v. CS Cattle Co.*, 109 N.M. 705, 709, 790 P.2d 502, 506 (1990). The Report erred as a matter of law, therefore, when it found the Compact ambiguous and re-wrote it.

II. THE REPORT IMPROPERLY SHIFTS THE BURDEN OF PROOF IN THIS CASE TO NEW MEXICO ON THE ABOVE-CONCHAS WATER ISSUE.

Texas and Oklahoma carry the burden of proof in this case. Report at 86-88. The Report finds that the plaintiffs met that burden. *Id.* at 87. New Mexico objects to that finding. The language of the Compact is contrary to the plaintiffs' position, and the plaintiffs have proffered no evidence that supports their claimed understanding of the Compact. Under these circumstances the Report's finding that the plaintiffs have met their burden is completely incorrect.

The Report's alternative suggestion that the Article IV(a) issue arose as an affirmative defense is in error. *See* Report at 87 n.54. New Mexico's Answer set out

numerous denials of the allegations of plaintiffs' Complaint. In the second paragraph of Paragraph 9 of these denials, New Mexico expressly addressed Article IV(a) as a legal defense to plaintiffs' allegation that "Article IV(b) of the Compact refers to storage capacity physically in place below Conchas Dam." *Compare* N.M. Answer at 4 (¶9) (Dec. 4, 1987) *with* Complaint at 4 (¶9) (Apr. 16, 1987). New Mexico's Answer also contained affirmative defenses, one of which referred again to Article IV(a) and discussed the large amount of water stored at Ute Reservoir which had "originated above Conchas Dam [and] reached Ute Reservoir as a result of [the] spills and releases from Conchas Dam which were commenced on February 6, 1987." New Mexico's Answer at 9 (2d Affirmative Defense) (Dec. 4, 1987). New Mexico quantified this "above Conchas Dam" water at over 180,000 acre-feet. *Id.* New Mexico intended to show that, as a factual matter, water originating in the basin above Conchas had been stored in Ute and later released so that, even if plaintiffs were to focus on storage of water rather than gross reservoir capacity, they would lose. This was a fact-based mootness defense which had nothing to do with the meaning of Article IV(a), but with the amounts of Article IV(a) water in Ute Reservoir.

The discussions of evidence in the Report demonstrate the complete lack of any direct evidence in support of plaintiffs' position. With respect to negotiating history and the position of the Bureau of Reclamation, the Report takes essentially ambiguous or neutral evidence and construes it in a manner which is adverse to New Mexico, shifting the appropriate burden. With respect to the understanding of the

Compact demonstrated after its ratification by the parties, the Report minimizes and sets aside affirmative evidence of the correctness of New Mexico's position, while citing *no* direct evidence to support the view that the plaintiffs in this lawsuit disagreed with the language of the Compact for the first thirty-seven years of its existence. The shift of the appropriate burden to New Mexico mandates rejection of the recommendations of Chapter VII of the Report.

A. The Report Improperly Construes Against New Mexico Evidence From the Negotiating History and Statements of the Bureau of Reclamation

The Report contradicts its own claim that the negotiating history conflicts with the Compact language, when it admits that negotiating history does not address the issue of spills over Conchas Dam. The Report states that "If [Conchas] spills were captured. . . by a downstream reservoir [in New Mexico], an event considered unlikely at the time but which has come to pass with New Mexico's construction of Ute Dam, there is nothing in the negotiating history of Article IV to suggest that conservation storage of such waters would not be chargeable against the 200,000 acre-foot limitation of Article IV(b). The most that can be said about the Engineer Advisors' treatment of Conchas spills is that they apparently did not project that they would recur with the frequency and magnitude that they subsequently have." Report at 67.

This language demonstrates that the plaintiffs did not carry their burden and that, instead, the burden was improperly shifted to New Mexico. The Report states that the negotiating history is silent about spills, and that the Engineer Advisors simply did not address them. Silence, however, should be neutral to

the issues of this suit, unless it is construed against the party who has the burden of persuasion. If there is no reason from the negotiating history to believe that spills would not be chargeable under Article IV(b), there is equally no reason to believe that spills would be chargeable under Article IV(b). The negotiating history does not expressly address the point. In the absence of evidence one way or the other from the negotiating history, the language of the Compact should prevail.

In a similar shift of burden, the Report misconstrues the evolution of Article IV. *Id.* at 68-74. After a discussion of that evolution, the Report can conclude only that "[t]here is noevidence that the use of the 'origination' language was intended to have any . . . substantive significance," and that "there is no support" for reading the Compact on its own terms, which would give New Mexico a share of water that spills or is released over Conchas Dam. *Id.* at 74. This is not evidence supporting the plaintiffs' position. It is neutral to the issues of this lawsuit, and should be either construed against the plaintiffs who have the burden, or should be ignored as unhelpful. The Report, however, construes the silence of the negotiating history against New Mexico.

The Report next suggests that it would be a complex matter, contrary to the simplicity for which the negotiators had hoped, to administer the Compact under a natural reading of its terms. This conclusion of fact, which is material to the plaintiffs' motion for summary judgment, is disputed and lacks support in the record, as New Mexico argued before the Special Master. The parties did not agree that this issue was

undisputed. *See* Tr. at 195-96 (June 19, 1990); *contrast id. with* Report at 4.

If the Report is correct that no state sought the spills in the negotiating process, then the disposition of those spills cannot be determined on the basis of what was sought in the negotiating process. The Report, however, argues that because New Mexico did not say it was seeking spills, New Mexico should have no share in those spills. The Report does not explain why it fails to apply this argument to the plaintiffs, who also said nothing. This failure places an improper burden on New Mexico.

The Report also comments that New Mexico's "only real complaint appears to be that it will be forced to share some of the Conchas Reservoir spills." *Id.* at 68. This is not only false, it again points up the contrast between the Report's treatment of New Mexico and its treatment of the plaintiffs. New Mexico's real complaint in this case is that the "originating" language of the Compact, on which it has relied in impounding Conchas spills at Ute Reservoir, is being removed and rewritten. New Mexico believes that the Compact results in a *de facto* sharing of Conchas spills. It is the plaintiffs, by contrast, who argue that they should be permitted to take virtually all such spills. The Report fails to acknowledge that the issue is the plaintiffs' claim to nearly 100% of Conchas spills. This failure demonstrates the Report's improper shift of the burden from the plaintiffs to New Mexico.

The Report's improper use of neutral evidence against New Mexico is also evident in the Report's discussion of supposed Compact construction by the Bureau in assessing likely streamflows for the Sanford Project in Texas. The Report misconstrues an assessment of probabilities as a legal interpretation. In fact, all the statements by the Bureau on spills over Conchas were either neutral or ambiguous, but the Report construes all of them against New Mexico.

In discussing the statements of the Bureau on this issue, the Report concedes that "[i]t is not usually appropriate to give much weight to the construction of a compact or statute by an agency not charged with its administration." Report at 84. The Report's departure from this rule demonstrates the flaws in the Report's analysis. The Report defends its reliance upon the Bureau's supposed subsequent construction of the Compact in a manner which flatly contradicts the Report's own conclusions. The Report states that the "fact that the Bureau may have had an interest in advancing a construction that would be conducive to providing the maximum water supply for the Sanford Project should not influence the weight to be given that construction," because "the 'safe annual yield' water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills." *Id.* at 85 n.52.

On the one hand, the Report claims that the Bureau is not biased on the issues in this lawsuit, because it did *not* rely on spills for the Sanford Project. On the other hand, the Report construes Bureau documents to mean that the Bureau *did* expect spills from Conchas as part of the water supply for the Project, and that therefore the Bureau held the legal opinion that the downstream states were entitled to nearly 100% of Conchas spills. This makes no sense.

The only way to understand the fact that the Bureau both did not rely on spills and did consider that spills might be possible is to recognize that the Bureau was not making a legal interpretation, but was instead making a practical assessment of probabilities. The practical reality is that whether "originating" is retained or discarded in the Compact, a share of spills will reach the Sanford Project. As discussed *supra*, for example, about 90,000 acre-feet of water spilled over Ute Dam on its way to Lake Meredith in 1987, even though New Mexico captured a share of those spills in its available empty capacity at Ute Reservoir. Thus the Bureau was absolutely correct to consider spills as a possible water supply for the Sanford Project. That fact, however, does not address the legal issue of the meaning of "originating," nor does it represent a legal position on the part of the Bureau.

In suggesting that the Bureau has construed the meaning of Article IV of the Compact, the Report misconceives the Bureau's entire approach. In both the 1954 and 1960 Definite Plan Reports, the Bureau was considering *streamflow*; that is, the likely yield of the Canadian River in ordinary years, which is important to the Bureau for planning purposes. Report at 85. The Bureau was not commenting on the disposition of floodwaters in its Definite Plan Reports, as no prudent engineer would consider the sporadic spills from Conchas as part of a reliable water supply. Thus it is incorrect to read the Bureau's practical assessment of water supply likely from New Mexico in ordinary years as a legal interpretation of how the Compact would operate in the rare event of substantial spills over Conchas dam.

The Report improperly burdens New Mexico in saying that New Mexico's failure to object to the Bureau's 1954 and 1960 Definite Plan Reports was "significant." *Id.* The Bureau, contrary to the Report's statement, did not circulate these reports to New Mexico for comment. Definite Plan Reports are internal documents for administrative use, and are not subject to circulation for comment under the Bureau's practice. *See* Flood Control Act of 1944, ch. 665, §1(c), 58 Stat. 887 (1944).

Moreover, New Mexico had formally commented in February 1950, as Compact negotiations were beginning in earnest, on the 1949 Sanford Project planning report, which said that the project would be subject to the Compact. New Mexico indicated it was satisfied at that time that the Bureau's water-supply studies "considered that no water originating above Conchas Dam would be usable by the Texas Project." H.R. Doc. No. 678, 81st Cong., 2d Sess. at XIII-XV (letters from Governor Mabry and New Mexico Compact negotiator John Bliss). *See id.* at VI (comments of Bureau of the Budget describing New Mexico view). After the signing of the Compact, New Mexico reasonably relied on the Compact to protect New Mexico's rights. *Contrast* Report at 85 n.53.

B. The Report Minimizes Affirmative Evidence Supporting the "Originating" Language of the Compact, but Suggests No Evidence Supporting Deletion of That Language.

In addition to relying on the Compact's language in this case, New Mexico proffered direct evidence that the Compact negotiators understood how that language would affect the issue of spills from Conchas Dam—the Bliss letter to Senator Anderson of Decem-

ber 1950, discussed *supra*. This piece of evidence, as described earlier, is the best and only contemporaneous evidence of the negotiators' own understanding of the application of the"originating" language in the Compact they had just signed. There is no evidence that any other Compact negotiator at any time expressed a contrary view. Thus, the Bliss letter should be entitled to great weight, as the only evidence on the point at issue from an authoritative source.

Inexplicably, the Report gives the Bliss letter little or no weight. The Report first suggests there is doubt about whether the spills referred to in the letter are spills over Conchas Dam, an obscure and erroneous suggestion since Conchas was the only significant dam in the area at the time. *See* Report at 75. The Report then goes on to say that, had Mr. Bliss actually meant what he said in this letter, he would also have said it in another letter written in the same week to his Governor. *Id.* This standard, that every serious position must be continuously stated, is an impossible standard to meet.

The Report dwells on later expressions of various New Mexico officials that 200,000 acre-feet of storage of below-Conchas water was sufficient to allow for present and future development in New Mexico, as if that position were in conflict with the view that New Mexico had a right to Conchas spills. *Id.* at 76-77. There is no such conflict. In assessing the outcome of the Compact, New Mexico officials, like the Bureau of Reclamation, prudently did not consider these sporadic spills as a water source upon which reliance could be placed. That prudence does not indicate a relinquishment of a right to those spills, especially in light of Mr. Bliss' letter showing that New Mexico

believed that spills were not included in the Article IV(b) limitation.

The Report's analysis also places burdens on New Mexico not placed on plaintiffs. The plaintiffs have provided absolutely no evidence that, although they signed the Compact, they did not at the time really mean the "originating" words to apply to the water spilling over Conchas Dam. No documents in the record even suggest that the plaintiffs held that reservation about the final Compact language. If they did hold such a reservation, it should be of no effect, *as they did not inform New Mexico of it.*

Courts are bound to give contract language its ordinary meaning, and a party contesting the reasonable construction of a contract must show either that both parties had a contrary intent, or that the party (or parties) seeking relief has no reason to know of that reasonable construction at the time of the making of the agreement. *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 697 (8th Cir. 1985); *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed. Cir. 1988). *See Sun Vineyards v. Luna County Wine Development Corp.*, 107 N.M. 524, 582, 760 P.2d 1290, 1294 (1988). Not only was there no showing of a contrary intent by the parties at the time the Compact was made, Oklahoma knew quite well of the reasonable construction of "originating" now advanced by New Mexico, as shown by Article V of the October 13 draft of the Compact, which Oklahoma later approved. *See* N.M. Ex. 30, Ex. C at 5-6; *id.*, Ex. F, at 3.

The Report has this exactly backwards, and mentions several times that New Mexico did not make its position on Conchas spills clear to Texas and Oklahoma during the negotiations. *See id.* at 78, 80. This

is false. *See* S.Rep.No. 1192, *supra*. Even if it were true, however, the Report does not explain why New Mexico had that duty, inasmuch as the words of the Compact gives those spills to New Mexico. Neither does the Report explain why it would be necessary for New Mexico to go out of its way to assert the language of the Compact, inasmuch as there was no controversy over spills until thirty-seven years later. Finally, the Report places no corresponding duty on the plaintiffs to inform New Mexico of their supposed theory that New Mexico had no right to capture Conchas spills, despite the Compact language. It is the plaintiffs who seek to change the language of the Compact, and it must therefore be the plaintiffs who carry a burden to have notified New Mexico of any understanding contrary to that language, prior to ratification and consent. Plaintiffs cannot do so, as no contrary understanding existed.

Another piece of evidence, dating from six years after the Compact was signed, also directly supports New Mexico's position. The Twenty-Second Biennial Report of the State Engineer of New Mexico (1956) ("1956 Biennial Report") reads:

> The limit of 200,000 acre-feet evidently applies only to waters originating in the drainage basin below Conchas Dam and does not include waters originating above Conchas which pass through the reservoir. From 1945 through 1953 an average 21,000 acre-feet of water passed the gaging station below Conchas. It is assumed that sufficient storage, in addition to the 200,000 acre-feet set forth in Article IV, Section (b), could be provided to regulate water originating above Conchas Dam without violating terms of the Compact.
>
> Pls. Ex. 112 at 79.

Again, this is positive direct evidence on the precise question at issue here—how the language of the Compact was understood to apply to spills. The plaintiffs have presented no indication of their contrary understanding until after this lawsuit began. Thus the 1956 Biennial Report should be entitled to great weight. Unaccountably, however, the Report says that "there is no evidence that this lower level staff engineer's interpretation was ever approved by the State Engineer's office or its legal counsel or replied on by New Mexico's Governor or legislature at any time during the period that the Ute Dam site was selected and the project authorized for construction." Report at 79.

There is no basis for this assertion. Ute Dam was first authorized for construction in 1957. Agreed Material Fact E1. The "interpretation" of the 1956 Biennial Report was the official report of the State Engineer and Interstate Stream Commission. The state law mandating reports by the State Engineer requires that "the state engineer shall prepare and deliver to the governor . . . a full report of the work of his office . . . with such recommendations for legislation and appropriation as he deems advisable." 1978 N.M. Stat. Ann. §72-2-5 (1985 Repl.Pamp.) (Laws 1907, Ch. 49, §8, as amended). The 1956 Biennial Report, therefore, must have been relied on when Ute was authorized for construction, with an ultimate capacity of 272,000 acre-feet; indeed, the thing speaks for itself. The official report of the State Engineer to the Governor and Legislature is not "lower level"

in nature, and no such report is made without full review of the State Engineer's staff.

The Report's rejection of this evidence is not warranted, particularly because the plaintiffs are unable to offer any authoritative evidence even roughly contemporaneous with the Compact which indicates a contrary view. It is clear, therefore, that the Report not only did not require the plaintiffs to meet their burden in this lawsuit, but also improperly shifted the burden to New Mexico.

III. PARAGRAPHS 1,4, AND 9 OF THE RECOMMENDED DECREE REQUIRE MODIFICATION REGARDLESS OF THE COURT'S DISPOSITION OF NEW MEXICO'S OTHER OBJECTIONS

A. Paragraph 1 of the Recommended Decree Contains Ambiguities and Should Be Corrected.

Paragraph 1 of the Recommended Decree states the following: "Under Article IV(a) of the Canadian River Compact ("Compact") New Mexico is permitted free and unrestricted use of the water of the Canadian River and its tributaries in New Mexico above Conchas Dam, *such use to be made above or at Conchas Dam*, including diversions for use on the Tucumcari Project." Report at 112 (emphasis added). No provision similar to Paragraph 1 of the Recommended Decree was included in the draft recommended decree attached to the Draft Report. *See* Draft Report at 104. Thus this is New Mexico's first opportunity to comment on this paragraph, and New Mexico had no previous opportunity to object.

The emphasized words of Paragraph 1, taken on their face and in isolation, could be interpreted to prohibit any use by New Mexico below Conchas Dam, except for use on the Tucumcari Project, of Canadian

River water "originating" above Conchas Dam. This interpretation of the words of Paragraph 1 restricts use of Canadian River waters originating "above Conchas Dam" to the area "above or at Conchas Dam" only. If this is the meaning of Paragraph 1, the Compact has been radically rewritten to impose both use and storage restrictions on Canadian River water in New Mexico, in defiance of the fact that the Compact expressly states that there are no use restrictions on that water at all. If this is indeed the meaning of Paragraph 1, New Mexico objects, for the following reasons.

The Compact places no limitation of any kind on New Mexico's use of the flow of the Canadian River, whether above or below Conchas Dam. The Compact also explicitly employs this strategy with respect to Texas' allocation under Article V, which states in part: "Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below." In keeping with the general strategy of the Compact, uses of the flow of the river are entirely unrestricted, with the only limitation being upon storage. Thus an interpretation of Paragraph 1 that leads to a restriction of New Mexico's use of Canadian River waters, either above or below Conchas Dam, is incorrect under any reading of the Compact.

Such an interpretation of Paragraph 1 also conflicts with evidence of the Compact's negotiating history. Raymond Hill, in his interpretive memorandum, summarizes the Compact with regard to this point:

> In general, it was found by the Engineer Advisors that the interests of all three sig-

> natory States in the waters of Canadian River would be amply protected if reasonable limitations were placed upon the amount of conservation storage in New Mexico and in Texas. It was the considered opinion of those participating in the negotiations that no restrictions should be placed upon the use of the unregulated flow of Canadian River or any of its tributaries.
>
> N.M. Ex. 30 at 5.

Thus, a restriction on New Mexico's use of Canadian River waters, as distinct from New Mexico's right to store those waters, is in direct contradiction to the negotiators' understanding.

Moreover, an interpretation of Paragraph 1 which restricts use of above-Conchas water would contradict the fundamental thrust of the Report. It would reflect that the Report agrees with New Mexico that the Compact refers to water "originating" above and below Conchas Dam in the natural sense of those words. Only if the word "originating" has a substantive significance would it make sense to restrict New Mexico's use of that water to uses made at or above Conchas. An interpretation of Paragraph 1 which restricted New Mexico's use of water based on where that water originated would thus flatly contradict the recommendations of the Report.

Therefore, New Mexico has a different understanding of Paragraph 1. New Mexico understands Paragraph 1 to mean that New Mexico may have free and unrestricted use under Article IV(a) of all waters at or above Conchas Dam. When those waters are released or spilled from Conchas Dam, however, they

are then governed by Article IV(b). Article IV(b) also gives New Mexico free and unrestricted use of those waters, subject only to a storage limitation of 200,000 acre-feet. The net result is that New Mexico has free and unrestricted use of Canadian River water, whether under Article IV(a) or Article IV(b), subject only to the storage limitations of Articles IV(b) and IV(c).

Contract law supports New Mexico's view that, given the assumptions and reasoning of the Report, New Mexico's understanding of Paragraph 1 of the Decree is more reasonable. An interpretation of a contract effectively deleting much of the contract cannot be sanctioned; contract clauses are always to be construed together. *Avedon Corp. v. United States*, 15 Cl.Ct. 771, 776 (1988); *American Bankers Life Assur. Co. v. United States*, 12 Cl.Ct. 166, 171 (1987). The interpretation of Paragraph 1 restricting use of water in the lower basin contravenes these basic contract-law rules, in that it would remove the "free and unrestricted use" language of the Compact.

B. Paragraph 4 of the Recommended Decree Omits Language of Reasonableness Used in Similar Provisions of Other Paragraphs; Identical Language Should Be Added To This Paragraph to Show That the Omission Was Not Intentional.

Paragraph 4 of the Recommended Decree states in part that "[n]o change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission." Report at 113. In Paragraph 5, a similar requirement of Commission approval is qualified with the parenthetical phrase

"which approval shall not be unreasonably withheld." *Id.* No such qualifying language appears in Paragraph 4. The omission was probably inadvertent, because there is no apparent reason why the Paragraphs should be treated differently. New Mexico asks that the Court add the language "which approval shall not be unreasonably withheld" as stated in New Mexico's Proposed Decree. *See* Appendix B at ¶11.

C. Paragraph 9 Refers to Violation, or Breach, of the Compact and Thus Has Inappropriately Prejudged an Issue Not Yet Before the Court; Even Under the Report's Reasoning and Assumptions, Paragraph 9 is Incorrect and Should Be Withdrawn

Paragraph 9 of the Recommended Decree has two serious flaws which require correction whether or not the Court denies New Mexico's other objections to the Report. *See* Report at 114.

The summary judgment proceedings in this case to date have only determined questions of Compact interpretation, or New Mexico's obligation in regard to the law under the Compact. Issues of the extent of violation, if any (that is, any *breach* of New Mexico's obligation), and the proper remedy to be imposed if a violation were found, were reserved for subsequent proceedings. The parties agreed and the Special Master stated in the proceedings herein that all questions of the extent of New Mexico's violation and the appropriate remedy therefor would be deferred until the Court's decision on the Compact interpretation phase of the case, which is the matter currently pending. *See* Pre-Trial Order No. 2 (December 1, 1988); Tr. at 42-44 (November 4, 1988).

The Decree of this Court should be concerned at this point only with interpretation of the Compact. If

New Mexico's exceptions to the Report are sustained, the matter will not need to be remanded, because New Mexico cannot be found to be in violation under any conceivable set of facts. If plaintiffs prevail, however, the nature of the Decree will be interlocutory and the matter will be remanded for determining the extent of New Mexico's violation, if any, and the appropriate remedy to the downstream states. Those proceedings on remand could indicate that New Mexico has not, in fact, been in violation. The Decree should not prejudice this possibility.

Paragraph 9 also can be read to find that New Mexico has been in continuous violation of the Compact since the spring of 1987, a conclusion which could be shown to be contrary to fact even under the Report's assumptions. The Report's conclusions were based on a capacity survey of Ute Reservoir made in 1983. The violation found by the Report on June 23, 1988 was only 1,800 acre-feet of excess storage. *Id.* at 111. The June 23, 1988 date was apparently chosen by the Report because the parties had stipulated that Ute Reservoir contained 232,000 acre-feet of water (excluding sediment) on that day, based on the 1983 reservoir capacity survey. It is almost certain that the extra sedimentation in Ute Reservoir by June of 1988, nearly five years after the 1983 capacity survey, would have increased the silt in Ute and reduced its capacity to store water by some 6,000 acre-feet, particularly in view of the high levels of sediment that could be expected to accompany the 1987 floods. *Id.* at 16-17 (annual approximate sediment inflow to Ute Reservoir agreed to be 1246 acre-feet per year). Thus, under a more recent capacity survey, New Mexico might not have been in violation of the Compact.

Therefore, New Mexico requests that if Paragraph 9 of the Recommended Decree is retained, it be modified to refer only to questions of Compact interpretation, with violations, if any, determined on the basis of facts to be presented on remand. The provisions of Paragraph 9 should be removed and replaced with provisions addressing only the issues currently before the Court. *See* Appendix B (New Mexico's Proposed Decree).

IV. A GOOD FAITH REQUIREMENT IS COUNTERPRODUCTIVE, BUT PRIMARY JURISDICTION MAY BE HELPFUL ON SOME ISSUES IF GUIDED BY WELL-DEFINED STANDARDS.

A. Imposition of a Requirement of Good Faith Negotiation in Original Actions Would Not Reduce Litigation

The Report accurately states that Congressional consent to the Compact, as well as contract law, "imposes an implied duty on the part of the compacting states to participate in good faith in the implementation of the compact plan to carry out its purposes." Report at 31. The duty to make a compact work does not, however, either as a matter of implicit Congressional intent or as a matter of contract law, mean that parties to a contract should not have access to judicial relief without engaging in efforts to negotiate a settlement, let alone the further requirement that these efforts be certified to be in good faith.

With respect to Congressional intent the Report acknowledges the fact that many compacts, such as the one at issue here, require unanimous agreement by the members of the Compact Commission on any issue of compact interpretation or implementation. *Id.* at 30. From this it may reasonably be inferred that Congress did *not* create the Commission as a forum

that could effectively resolve all disputes between the states, and instead contemplated the invocation of this Court's original jurisdiction. *See Texas v. New Mexico, supra*, 462 U.S. at 564 (1983). The requirement of good faith under contract law is defined by the Uniform Commercial Code (1972) at §1-201(19) as "honesty in fact in the conduct or transaction concerned". *See* Restatement (Second) of Contracts §205 (1979). Nothing in contract law suggests that a party, in order to show its honesty in fact, must engage in certified good faith negotiation whenever there is a dispute, no matter how incorrect it believes the other party to be legally, or how harmful delay caused by negotiation could be to its interests.

The present case provides an example of how the Report's suggestion could do much harm and little good. The issue which precipitated the present case was a disagreement concerning Compact interpretation arising from New Mexico's decision to enlarge Ute Reservoir. The plaintiffs argued that the Compact limited the amount of physical storage capacity New Mexico could build in the Canadian River basin below Conchas Dam. New Mexico took the view that the limitations of the Compact went not to physical storage capacity, but only to the amount of water stored. As the record of this case reflects, the members of the Commission discussed the controversy prior to litigation and made their positions clear. Report at 19-22. It was an all or nothing question—whether the Compact permitted the enlargement of Ute Reservoir to the size New Mexico wished.

Despite eighteen years' notice that New Mexico built Ute Dam to be enlarged, the plaintiffs did not voice an objection to the enlargement until 1982, when

New Mexico had already committed significant time and money to the project. *Id.* at 19. In New Mexico's view, the fact that the Texas and Oklahoma members of the Commission failed to raise any objection to the enlargement of Ute Reservoir until construction bids were already submitted demonstrates that, for most of that time, the plaintiffs agreed with New Mexico that such a reservoir was within New Mexico's rights. Plaintiffs' last-minute objections put New Mexico in the extremely difficult position of having to choose between losing time and money by delaying the Ute Reservoir project, or incurring the risk that the plaintiffs' interpretation of the Compact would be found to be correct. Weighing these factors, New Mexico decided to take that risk and proceed with construction. New Mexico's decision has been vindicated by the Report's recommendation that the plaintiffs' position on the capacity issue be rejected. *Id.* at 24.

The Report seems to imply that New Mexico was unreasonable in that it would not "at least agree to delay" the building of Ute Reservoir pending further negotiations. *Id.* at 20. Such an implication completely ignores how much that delay would have cost New Mexico. As a practical matter New Mexico had a window of opportunity within which political and funding considerations were favorable for the enlargement of Ute Dam. A delay would certainly have been expensive and might have been fatal to the project.

A requirement of good-faith negotiations would not have usefully addressed this real-world situation. Assuming that New Mexico would not have been permitted to proceed with the enlargement of Ute Dam pending negotiations, the Report's scheme provides

no relief to New Mexico, but would instead unfairly impose further delay. New Mexico would have been required to take risks and to pay costs of a delay which would cost the plaintiffs nothing to impose. New Mexico would have had to incur those risks and costs in order to negotiate a legal question of contract interpretation with respect to which the Report indicates New Mexico was entirely correct. Thus, because of the nature of the capacity issue, a requirement of good faith negotiation would have harmed New Mexico, with no guarantee of success. Under these circumstances, swift access to the Court should not be barred. *New Mexico Assoc. for Retarded Citizens v. New Mexico*, 678 F.2d 847, 850 (10th Cir.1982). See *United States v. Philadelphia National Bank*, 374 U.S. 321, 353-54 (1962) (where the Court refused to apply the doctrine of primary jurisdiction where it would uselessly postpone Court action).

A State's responsibility to be both fair to its sister states and zealous for its own citizens is not so inherently untrustworthy that it must be ensured by the threat of sanctions and the certification of its attorney general. New Mexico considers that it has an obligation under all interstate compacts to conduct good faith discussions on matters of mutual interest with the other parties. New Mexico fulfilled this responsibility in this case. *See generally* Tr. (September 29, 1982). Within the ambit of this responsibility, a sovereign State should be presumed to be acting in good faith in making a decision, whether that decision is to adhere to its legal opinion in a dispute, to negotiate a compromise, or to file suit.

B. The Application of a Doctrine of Primary Jurisdiction, if Well-Defined in Basis and Scope, Could be Beneficial in These Cases, Depending on the Nature of the Issues

The doctrine of primary jurisdiction is designed to serve two purposes. First, the doctrine is grounded in the necessity for administrative uniformity. *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907). Second, the doctrine places issues requiring technical expertise for their solution in the hands of a "body of experts" capable of dealing with "intricate facts." *Great Northern R.R. v. Merchants Elevator Co.*, 259 U.S. 285 (1921). Thus, the doctrine of primary jurisdiction is not invoked where there is no pervasive regulatory scheme requiring uniform application. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-52 (1959). Nor will the doctrine be invoked where the nature of the particular controversy means that jurisdiction in the courts will place no obstacle to an agency's mission. *Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1977).

In the present case, the capacity issue and the issue of above-Conchas water are both compact interpretation questions, rather than parts of a uniform administrative scheme or proper subjects for expert analysis. The doctrine of primary jurisdiction, therefore, is not especially appropriate with respect to these issues. As the Report suggests, the Court could nevertheless invoke the doctrine for the purpose of having the Commission compile the record in these controversies. Report at 32. Such a procedure could be followed, but its benefits over an outside party such as a Special Master are not clear.

With respect to issues that are more technically oriented, the use of the doctrine of primary jurisdiction in the Commission is both more justified and more likely to produce useful results for the Court. For example, the technical issues surrounding New Mexico's establishment of a desilting pool at Ute Reservoir, unlike questions of compact interpretation, call for the kind of agency expertise that the doctrine of primary jurisdiction is intended to invoke. Also, unlike the issue of whether the word "originating" in the Compact is to be disregarded, questions such as whether a desilting pool falls within the spirit of the Compact's intended meaning are likely to recur before the Commission and should be dealt with in a consistent way. This also argues for primary jurisdiction with respect to technically oriented questions.

For the process to be workable, the procedures and standards for primary jurisdiction should be carefully set out. For example, the compilation of an intelligible record for the benefit of the Court would be aided by some objective legal expertise. Thus, the Court may prefer that a referee be appointed to assist the Commission both in compiling the relevant evidence and in organizing for the Court a third-party picture of the Commission's conclusions. The precise authority of that referee should be made clear. New Mexico suggests that the referee have plenary control over the composition of the record, and of evidentiary procedures, but confine any comments on the merits to summaries of Commission positions for the benefit of the Court. If the Court deems it advisable, the referee could be required separately to make recommendations on issues remaining open. The advantage would be that this referee would have the benefit of the

participation of the Commission in proceedings to which the Commission's contribution of experience with this Compact and technical expertise would be valuable. *De novo* review in this Court, or by its Special Master, would preserve all States' access to the original jurisdiction of this Court.

With these or similar procedures in place, the doctrine of primary jurisdiction could be a helpful device whereby the Court could obtain the experience and expertise of a Commission. New Mexico supports the use of the doctrine on issues that are technically oriented and in particular supports the use of the doctrine with respect to the desilting pool issue in the present case.

CONCLUSION

For the reasons stated above, New Mexico objects to the conclusions in Chapter VII of the Report, and requests the Court to reject those conclusions. The Recommended Decree should be replaced by New Mexico's Proposed Decree, attached as Appendix B. If not, Paragraphs 1, 4, and 9 of the Recommended Decree should be deleted or modified in any event. A doctrine analogous to primary jurisdiction should be guided by articulated standards if it is to be useful.

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APPENDIX

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss, for the State of New Mexico, E.V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this compact:

(a) the term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River;

(b) the term "North Canadian River" means that major tributary of Canadian River officially knows as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River;

(c) the term "Commission" means the agency created by this Compact for the administration thereof;

(d) the term "conservation storage" means that portion of the capacity of reservoirs available for the storage of

water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property;

(b) Until more than 300,000 acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of Northern Canadian River, shall be limited to 500,000 acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to 200,000 acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b);

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or

reservoirs in which such excess water is being held; and provided further that on demand by the commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve months; and provided further that no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three Commissioners, and one from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional

Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the three signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualified independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation

of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper administration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory State, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the states, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency,

municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States. The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed four counterparts hereof, each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss
John H. Bliss
Commissioner for the State of New Mexico

/s/ E. V. Spence
E. V. Spence
Commissioner for the State of Texas

/s/ Clarence Burch
Clarence Burch
Commissioner for the State of Oklahoma

APPROVED:
/s/ Berkeley Johnson
Berkeley Johnson
Representative of the United State of America

APPENDIX B

NEW MEXICO'S PROPOSED DECREE

1. Under Article IV(a) of the Canadian River Compact (Compact), New Mexico has free and unrestricted use in New Mexico of the water of the Canadian River originating above Conchas Dam. Water originating in the Canadian River drainage basin in New Mexico above Conchas Dam is not subject to Article IV(b) of the Compact.

2. Under Article IV(b) of the Compact, New Mexico is limited to an aggregate of 200,000 acre-feet of conservation storage of water originating in the Canadian River drainage basin in New Mexico below Conchas Dam for any beneficial use, exclusive of the exempt purposes specified in Article II(d) of the Compact.

3. Quantities of water stored for flood protection, power generation, or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife, or other purposes not mentioned in the Compact. In situations where storage is made predominantly, though not exclusively, for an exempt purpose, nothing in the Compact precludes the Canadian River Commission (Commission) from exempting all or an appropriate portion of such storage from chargeability as conservation storage.

4. Water stored at elevations below a dam's lowest permanent outlet works is not chargeable as conservation storage under the Compact. If other means of water discharge, such as pumps, are employed below the permanent outlet works, water stored above the elevation of the lower water discharge is chargeable as conservation storage, unless the Commission approves otherwise. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission. Water stored

for non-exempt purposes behind a dam with no outlet works is chargeable as conservation storage.

5. Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes will not be exempt from conservation storage unless approved by the Commission.

6. All water originating below Conchas Dam stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725 and such portion of the water stored between elevations 3725 and 3741.6 as the Commission or this Court may determine, pursuant to paragraph 10 of this decree, is reasonably stored for sediment control.

7. There are eleven reservoirs other than Ute Reservoir within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet with a total capacity of 6,670 acre-feet, including undetermined sediment accumulation. All water stored in these reservoirs is conservation storage.

8. There are 63 small reservoirs in New Mexico with capacities less than 100 acre-feet with a total capacity of about 1,000 acre-feet, which the Commission has treated as de minimis. Water stored in these reservoirs is not chargeable as conservation storage.

9. The amounts of water and sediment contained in any reservoir in the Canadian River basin below Conchas Dam shall be determined by the latest reservoir capacity survey approved by the Commission.

10. The States are directed to enter into appropriate proceedings before the Commission to determine whether and to what extent water may be stored in the desilting pool portion of the Ute Reservoir sediment control pool without chargeability as conservation storage. In making such determination, the States shall request the chairman of the Commission to enlist the assistance of the Bureau

of Reclamation, the Corps of Engineers, and other appropriate federal or state agencies. The States, through the Commission, shall compile a record of the documents, written legal arguments and any transcripts of testimony or argument on which its deliberations and decision, if any, are based. If unanimous Commission action cannot be achieved within one year of this decree, any State may petition this Court to resolve the dispute. Consideration of the dispute by this Court shall be *de novo* and shall not be limited to the administrative record developed before the Commission.

11. In all instances in this Decree where Commission approval or exemption is required or permitted, such approval or exemption shall not be unreasonably withheld.

12. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of this decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

NO. 109 Original	TITLE State of Oklahoma and State of Texas, Plaintiffs v. State of New Mexico

DOCKETED	COURT
April 16, 1987	Motion for leave to file Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
	Counsel for plaintiffs: R. Thomas Lay
	Counsel for defendant: Eric Richard Biggs
April 16, 1987	Motion for leave to file Bill of Complaint filed.
June 16, 1987	Order extending time to file a response to motion for leave to file bill of complaint granted until June 25, 1987.
June 25, 1987	New Mexico's brief in opposition to the Oklahoma and Texas motion for leave to tile bill of complaint filed.
June 30, 1987	DISTRIBUTED. Sept. 28, 1987.
Oct. 5, 1987	The motion for leave to file a bill of complaint is granted and defendant is allowed sixty days within which to file an answer.
Dec. 4, 1987	New Mexico's answer to bill complaint filed.
Dec. 9, 1987	DISTRIBUTED. Jan. 8, 1987. (Answer of New Mexico to bill of complaint).
Jan. 19, 1988	It is ordered that Jerome C. Muys, Esquire, of Washington DC, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate. The compensation of the Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Jan. 25, 1988	Oath of the Special Master received.
June 3, 1988	Request of Special Master for interim compensation filed.
June 3, 1988	DISTRIBUTED. 6/9/88. (Request of Special Master).
June 13, 1988	The motion of the Special Master for an order authorizing interim compensation and reimbursement of expenses is granted and the Special Master is awarded $16,771.79.

(OVER)

4 pp

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 15, 1988	Letter from the Special Master respecting plaintiffs' motion for leave to file a supplemental complaint file
Oct. 3, 1988	DISTRIBUTED. Oct. 7, 1988. (Above letter from Special Master).
Nov. 18, 1988	Motion of plaintiffs for leave to file supplemental compla filed.
Nov. 22, 1988	DISTRIBUTED. Dec. 9, 1988. (Above motion).
Nov. 30, 1988	Response by New Mexico filed. (D).
Dec. 12, 1988	The motion of plaintiffs for leave to file a supplement complaint is granted. Brennan, J., OUT.
Jan. 7, 1989	Motion of New Mexico for leave to file a supplemental answer filed.
Jan. 11, 1989	DISTRIBUTED. Feb. 17, 1989. (Above motion).
Jan. 19, 1989	←Opposition to Motion of New Mexico for leave to file a supplemental answer filed by Plaintiffs.
Jan. 21, 1989	Motion of Special Master for compensation and reimbursement of expenses filed.
Jan. 25, 1989	DISTRIBUTED. Feb. 17, 1989. (Motion of Special Master for compensation and reimbursement of expenses).
Jan. 26, 1989	New Mexico's Reply to motion for leave to file supplemental answer filed.
Feb. 21, 1989	The motion of New Mexico for leave to file a supplemental answer is granted. The motion of the Special Master for award of fees and expenses is granted the Special Master is awarded $22,744.99, to be paid equally by the parties.
ct. 5, 1989	Interim report by the Special Master filed. (NP)
ct. 5, 1989	Motion of Special Master for payment of compensation an reimbursement for expenses for the period December 1, 1988 through August 31, 1989 filed.
Oct. 11, 1989	DISTRIBUTED. Oct. 27, 1989.
Oct. 30, 1989	The interim report of the Special Master is received and ordered filed. The motion of the Special Master for allowance of compensation and reimbursement of expenses is granted and the Special Master is awarded $22,200.83 - one third to be paid by each party.
pr. 23, 1990	Motion of the Special Master for approval of fees for the period Sept. 1, 1990 through Jan. 31, 1990 filed.
ay 15, 1990	DISTRIBUTED. May 31, 1990. (Motion of Special Master for approval of fees).
June 4, 1990	The motion of the Special Master for allowance of compensation an reimbursement of expenses is granted and the Special Master is awarded $61,292.54 for the period Sept. 1, 1989 through Jan. 31, 1990 -- one-third to be paid by each party.
Oct. 16, 1990	Report of the Special Master received.

Card No. 2.

NO.	TITLE
109 Original	State of Oklahoms and State of Texas, Plaintiffs v. State of New Mexico

DOCKETED	COURT
April 16, 1987.	Motion for leave to file Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
Oct. 17, 1990	DISTRIBUTED. Nov.2, 1990. (Report of Special Master).
Oct. 12, 1990	Response by Coloradoto the Report of the Special Master filed.
Oct. 17, 1990	Response by the U. S. to the Report of the Special Master filed.
Nov. 5, 1990	The Report of the Special Master is received and ordere filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days.
Dec. 4, 1990	Motion of the Special Master for compensation and reimbursement of expenses filed.
Dec. 5, 1990	DISTRIBUTED. Jan. 4, 1991.
Dec. 20, 1990	Exceptions of Texas to the Report of the Special Master fil
Dec. 20, 1990	Exceptions of New Mexico to the Report of the Special Master filed.
Dec. 20, 1990	Exceptions of Oklahoma to the Report of the Special Master filed.
Jan. 7, 1991	The motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $71,790.81 for the period February 1, 1990 through November 8, 1990 - on third to be paid by each party.
Jan. 22, 1991	New Mexico's reply to Texas' and Oklahoma's excepetions to Report of Special Master filed.
Jan. 22, 1991	Reply of Oklahoma to New Mexico's exceptionss to the Special Master's Report and Brief in Support filed.
Jan. 23, 1991	DISTRIBUTED. Feb. 15, 1991.
Jan. 22, 1991	Reply of the State of Texas filed.
Feb. 19, 1991	The Exceptions to the Report of the Special Master set for oral argument in due course.
Feb. 25, 1991	The motion of Oklahoma for divided argument on behalf of plaintiffs is granted. The motion of New Mexico that oral argument be set for the March Calendar rather than the April Calendar is denited.
Feb. 27, 1991	Set for oral argument Tuesday, April 16, 1991.(3rd case)
March 22, 1991	CIRCULATED.
April 16, 1991	Argued.
June 17, 1991	Exceptions sustained in part and orverruled in part, and case remanded. White, J. delivered the opinion of the Court, in which Marshall, Blackmun, Stevens, and

Title

No.

DATE		PROCEEDINGS AND ORDERS
		Souter, JJ., joined, and in Parts I, II, and IV of which Rehnquist, C.J. and O'Connor, Scalia, and Kennedy, JJ., joined. Rehnquist, C.J., filed an opinion concurring in part and dissenting in part, in which O'Connor, Scalia, and Kennedy, JJ., joined.
Dec. 15, 1991		Motion of Special Master for compensation and reimbursement of expenses filed
		DISTRIBUTED. Jan. 10, 1992.
Jan. 13, 1992		Motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $14,499.45 for the period December 1, 1990 through October 31, 1991, to be paid one-third by each party.
July 12, 1991	New	Mexico's petition for rehearing filed.
Aug. 2, 1991		DISTRIBUTED (Summer Rehearing List 2)
Sept. 13, 1991		Rehearing denied.
(Board)		
May 28, 1993		Report of Special Master filed.
May 28, 1993		Joint motion for entry of stipulated judgement and decree filed.
June 2, 1993		DISTRIBUTED. (Above Report and Motion) June 18, 1993.
June 21, 1993		REDISTRIBUTED. June 25, 1993 (Above report and motion)
June 28, 1993		ORDER: The Solicitor General is invited to file a brief in this case expressing the views of the United States on the Joint Motion for Entry of Stipulated Judgment and Decree.

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 109, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATES OF OKLAHOMA AND TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

Jerome C. Muys, *Special Master*

REPORT ON REMANDED UTE RESERVOIR SEDIMENT CONTROL ISSUE AND RECOMMENDATION FOR ENTRY OF THE PARTIES' STIPULATED JUDGMENT AND DECREE

May 28, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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I. STATEMENT OF THE REMANDED ISSUE

The issue remanded to the Special Master by the Court in its decision of June 17, 1991, *Oklahoma and Texas v. New Mexico*, 501 U.S. ___, 111 S. Ct. 2281, 2293, involves the legal status under the Canadian River Compact ("Compact," 66 Stat. 74) of an estimated 25,000 acre-feet of water stored in Ute Reservoir on the Canadian River in New Mexico between elevation 3725, the location of the Ute Dam outlet works,[1] and elevation 3741.6.

Compact Article II(d) defines "conservation storage" in terms of water stored "for subsequent release" for specified beneficial uses and excludes water stored for certain other purposes, including "sediment control":[2]

> The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

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[1] "An outlet works regulates or releases water impounded by a dam. It can release incoming flows at a retarded rate, as does a detention dam; it can divert incoming flows into canals or pipelines, as does a diversion dam; or it can release stored waters at rates dictated by downstream needs, by evacuation considerations, or by a combination of multiple-purpose requirements." N.M. Ex. 101 at 435.

[2] 66 Stat. at 75. Although the definition is framed in terms of reservoir "capacity," the Court's 1991 decision interpreted it as referring to "stored water." 111 S. Ct. at 2286-89.

No trial was conducted in the earlier proceedings. Rather the legal issues were decided on the parties' Agreed Statement of Material Facts based on supporting documents and deposition testimony. The state of the record and the parties' contentions on the sediment control issue in the earlier proceedings are set out at pages 89-101 of the Special Master's Report of October 15, 1990.

In the earlier proceedings New Mexico contended that the water between the outlet works and elevation 3741.6 is part of a "sediment control pool" and thus exempt by virtue of Article II(d) from chargeability against Article IV(b)'s 200,000 acre-foot limitation on conservation storage by New Mexico in the Canadian River basin below Conchas Dam.

Texas and Oklahoma conceded that any water stored in the "dead storage" portion of the sediment control pool below the outlet works is exempt from chargeability as conservation storage, recognizing that the primary purpose served is sediment deposition and that, in any event, such volumes are not physically available for subsequent release as required by Article II(d). However, they disagreed that the additional storage in the "desilting pool" between elevations 3725 and 3741.6 is exempt, arguing that the Compact exclusion applies only to water stored "primarily" for sediment control and that the desilting pool serves no present or reasonably forseeable recognized sediment control function. They alleged that the dominant. if not sole function of the pool is the maintenance of a minimum pool for recreation and fish and wildlife purposes. New Mexico countered that the current recreation use of the desilting pool is only "incidental" to its primary sediment control

purpose and should not vitiate its otherwise exempt status.[3]

II. THE PROCEEDINGS AND RECORD ON REMAND

The parties met with the Special Master in Denver, Colorado on August 27, 1991, to establish procedures for resolving the remanded "sediment control pool" issue. New Mexico requested that the record in the earlier proceedings be reopened to permit it to present additional testimony and documentary evidence on the issue. Texas and Oklahoma opposed this request, pointing to the Special Master's statement in his initial report that "the sparse record developed by the parties probably provides an adequate basis for a decision" on the issue. 1990 Rep. at 99-100. The Special Master nevertheless directed New Mexico to file a motion detailing the additional evidence it wished to present and identifying its relevance and materiality to the remanded issue. After New Mexico had done so and Texas and Oklahoma had filed their objections, the Special Master issued an order granting New Mexico's motion and directing the parties to submit an opening round of prepared testimony with accompanying exhibits and responses to the other par-

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[3] New Mexico also argued in the earlier proceedings that even if the recreation use of the pool is viewed as its dominant purpose, maintenance of a minimum pool for recreation and fish and wildlife purposes is not a "conservation storage" purpose under the Compact Article II(d) definition, nor is such water stored "for subsequent release" as specified in that article, inasmuch as the New Mexico Interstate Stream Commission ("NMISC") obligated itself under its 1962 contract with its sister agency from releasing any of the water in the minimum pool. The Special Master's Report of October 15, 1990 (Chapter IX) rejected this argument and New Mexico did not file exceptions to that recommendation.

ties' initial submittals. New Mexico filed the testimony of two witnesses with supporting exhibits.[4] Texas and Oklahoma filed answering testimony of six witnesses with accompanying exhibits.[5]

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[4] New Mexico's principal witness was Ernest L. Pemberton, a sedimentation engineering consultant and former Bureau of Reclamation employee with 22 years experience as a specialist in the Sedimentation Section of the Bureau's Denver office, which he headed from 1970 until his retirement in 1982. Mr. Pemberton presented a study of the sediment inflow and its distribution in Ute Reservoir, with particular attention to the projected deposits of sediment in the vicinity of the proposed Eastern New Mexico Water Supply Project's pumping plant in the year 2033.

New Mexico's other witness was Philip B. Mutz, currently an engineering consultant to the NMISC and New Mexico's commissioner on the Canadian River Commission. Drawing on his 33 years of experience with the NMISC, he testified with respect to the objectives of New Mexico in constructing and operating Ute Dam and Reservoir, specifically the allocation of sediment control capacity in the reservoir.

[5] Texas' principal witness was Dr. Daryl B. Simons, a consulting engineer with extensive academic, government and private experience. Dr. Simons did not present his own study of projected sedimentation at Ute Reservoir, but disagreed with Mr. Pemberton's study methodology and conclusions in several respects.

Other Texas witnesses were Brent E. Spronk and Dale E. Book, water resources engineers, who testified generally about the engineering aspects of New Mexico's arguments and the extent of evaporation of water associated with the Ute Reservoir desilting pool, and John C. Williams, General Manager for the Canadian River Municipal Water Authority, which operates the Sanford Project in Texas, who described operations at Lake Meredith with particular emphasis on sedimentation matters and the function of the inactive pool maintained above dead storage

Two days of trial were held in Denver on January 28-29, 1992, at which the prepared testimony was copied into the record, the witnesses subjected to cross-examination, and the parties' exhibits admitted into evidence. Several post-trial affidavits were also submitted, followed by three rounds of briefing. A Draft Report was submitted to the parties for comment on June 18, 1992 and a full day of oral argument on the Draft Report was conducted in Denver on August 20, 1992. The resulting record consists of 820 pages of transcript of the pre-trial conference, trial and oral argument, 83 exhibits, and 276 pages of briefs, proposed findings of fact and conclusions of law and comments on the Draft Report.

III. THE PARTIES' PROPOSED SETTLEMENT OF THE DISPUTE

At the close of oral argument on the Draft Report the parties were urged to consider seriously the possibility of settling their dispute. They were subsequently sent a copy of a revised proposed decree and commentary for further comment. They responded by filing a joint motion requesting a stay of the proceedings so that New Mexico might undertake a sediment survey of Ute Reservoir and the parties might

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at that reservoir.

Oklahoma witnesses were Patrick J. Yonikas, Acting Engineer Manager in the Water and Wastewater Department of the City of Oklahoma City, Oklahoma, who addressed the effect of sediments on pumping facilities and water treatment requirements, and Harold L. Springer, Chief of the Engineering Division of the Oklahoma Water Resources Board, who testified with regard to the downstream impacts of withholding water for sediment control purposes at Ute Reservoir as opposed to power production and flood control.

seek to reach agreement on a stipulated judgment and decree. Their motion was granted with certain modifications by order of October 26, 1992. The parties were required to submit a report on the status of their settlement efforts by March 1, 1993, so that prospects for settlement could be assessed. That date was subsequently extended to March 15, 1993.

The parties' report of March 15, 1993, stated that (1) agreement had been reached to have the Bureau of Reclamation conduct the Ute Reservoir sediment survey and that it had been performed during November 1992, with assistance from the New Mexico Interstate Stream Commission and the Oklahoma Water Resources Board, (2) the Bureau's draft report dated February 18, 1993 had been reviewed by the parties and comments submitted to the Bureau in early March 1993, and (3) the parties were actively engaged in seeking to reach agreement on a stipulated judgment and decree.

By letter of March 24, 1993, the Special Master urged the parties to expedite their settlement negotiations and to submit a further progress report on April 19, 1993, so that, if settlement prospects were not encouraging, there would be time for the Special Master to file his report with the Court and for the Court to set a briefing schedule for exceptions before the current term ended.

The parties reported on April 19, 1993, that significant progress had been made toward settlement of the case and provided details as to the extent of their negotiations. A conference was convened by the Special Master in Santa Fe, New Mexico, on April 26, 1993, at which time the parties presented the Special Master with a draft stipulated judgment that

was near final agreement and reported that they were working on proposed changes to the Special Master's proposed decree.

Further negotiations produced a final stipulated judgment and decree which were approved by the Special Master. Following final approval by the respective attorneys general, the parties' joint motion for entry of their stipulated judgment and decree was filed with the Court and is also set forth in the appendix to this Report.

IV. RECOMMENDATION TO ENTER THE PARTIES' STIPULATED JUDGMENT AND DECREE

A. Judgment

The stipulated judgment finds that New Mexico has been in violation of Article IV(b) of the Canadian River Compact since an undefined time in 1987 and establishes a schedule of water releases from Ute Reservoir and of reservoir storage levels to be maintained by New Mexico over the period 1993-2002 to come into compliance with the Compact and to compensate Texas and Oklahoma for the period of New Mexico's violation. It also provides for payment by New Mexico of $200,000 to Texas and $200,000 to Oklahoma for their attorneys fees, without conceding any legal obligation to do so.

New Mexico's present claim for exempt status for water stored between elevations 3725 and 3741.6 at Ute Reservoir should be denied, without prejudice to New Mexico's right to seek an appropriate exemption from the Canadian River Commission ("Commission") and, if necessary, from this Court at such time as (1) the Eastern New Mexico Water Supply Project or other project is authorized and funded and (2) New

Mexico demonstrates that inactive storage of some quantity of water above elevation 3725 is a necessary and reasonable use of such water to protect a project's pumping or other operational facilities from significant adverse impacts of sediment flow.

The Special Master *finds* that the proposed judgment is fair, practical and can be easily implemented and *recommends* that it be entered.

B. Decree

The approved decree largely reflects the Special Master's proposed decree that was ready for submittal to the Court in the Fall of 1992 when the parties requested a stay of proceedings to pursue settlement negotiations. It has been modified to reflect the fact that the Ute Reservoir sediment survey, which would have been mandated by the Special Master's decree, has already been accomplished and will be used for determinations of Compact compliance by New Mexico. The decree has also been modified to coordinate its provisions with the stipulated judgment.

The Special Master's comments on the provisions of the decree are set forth below:

Paragraph 1

Paragraph 1 implements the Court's interpretation of Compact Article IV(a), clarified to include diversions at Conchas Dam for use on Bell Ranch as well as the Tucumcari Project and the storage of irrigation return flows or operational waste on those projects before they reach the mainstream or tributaries of the Canadian River. *See* 111 S. Ct. at 2293 note 12. *See also Ide v. United States*, 263 U.S. 497, 505-06 (1924); *Nebraska v. Wyoming*, 325 U.S. 589, 615 note

11 (1945) and *Bean v. United States*, 163 F.Supp. 838, 845 (Ct. Cl.), *cert. denied*, 358 U.S. 906 (1958). It also preserves New Mexico's authority to permit the transfer of water rights from above Conchas Dam to locations below Conchas Dam, subject to the storage limitations of Compact Article IV(b). *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Paragraph 2

Paragraph 2 implements the Court's interpretation of Compact Article IV(b), but exempts the on-project storage by the Tucumcari Project and Bell Ranch provided for in Paragraph 1.

Paragraph 3

Paragraph 3 clarifies the Compact Article II(d) exemption of water stored "solely" for flood control, power generation, and sediment control from chargeability as conservation storage. In a multipurpose project no area of the reservoir, as a practical matter, is used exclusively for any particular purpose. Dead storage comes close to serving only a single function, *i.e.*, sediment control, but even dead storage water also helps provide "head" for power generation and provides fish habitat where, as at Ute, recreational fishing is an important use of the reservoir. The Compact's use of "solely" to limit exemptions for flood control, power generation and sediment control, if applied literally, could impose an unattainable condition with respect to such exempt classifications in a multiple purpose reservoir. Consequently, since a literal application of the

exemption language would produce a seemingly absurd result that appears to be inconsistent with the basic intent of the Compact and would present a serious definitional problem, the Special Master has concluded that "solely" was intended to mean "primarily." *See Public Citizen v. United States Dept. of Justice,* 491 U.S. 440 (1989).

In addition, the Commission is authorized to make allocations between conservation storage and exempt storage in situations where the two classes of storage may be commingled.

Paragraph 4

Paragraph 4 makes it clear that water in "dead storage" is not conservation storage unless it is primarily used for a non-exempt purpose or there is a record of water having been discharged from the area below a dam's outlet works by pumping. This paragraph requires prior Commission approval to change the outlet works to a higher elevation, *e.g.*, because of sediment encroachment, in order to exempt the water stored below the elevated outlet works from chargeability as conservation storage. In the unlikely event that a dam is constructed without outlet works and stores water for conservation storage purposes, *e.g.*, recreation, such storage is classified as conservation storage even though it is not physically "available . . . for subsequent release". Neither the Compact nor its negotiation history shed any light on that description. The definition of conservation storage was probably premised on the assumption that water would be stored behind a conventional dam with outlet works designed to be the sole discharge facilities

and that the storage below the outlet works would primarily be used to capture sediment. Consequently, in situations where a dam either has no outlet works or the water below the outlet works is used primarily for a non-exempt purpose, the descriptive language is inapplicable and provides no basis for converting water stored for what would otherwise be conservation storage into exempt storage.

Paragraph 5

Paragraph 5 is a general prohibition against unilateral designation or redesignation of conservation storage volumes to an exempt status.

Paragraph 6

Paragraph 6 denies New Mexico's claim for exempt status for water stored above elevation 3725 at Ute Reservoir at this time, without prejudice to New Mexico later reasserting its claim before the Commission and the Court if it can demonstrate changed circumstances justifying the claimed exemption.

Paragraph 7

Paragraph 7 exempts from conservation storage chargeability water in small reservoirs of 100 acre-feet capacity or less for which the Commission has waived conservation storage reporting requirements, apparently because of their *de minimis* impact downstream and the disproportionate reporting requirement burden. As a federal interstate administrative agency, the Commission presumably has the power to take such action. *See Alabama Power Co. v. Costle,* 636 F.2d 323, 360-61 (D.C. Cir. 1980).

Paragraph 8

Paragraph 8 directs New Mexico to make appropriate releases at the maximum rate consistent with the safe operation of its storage facilities, after compliance with the schedule set forth in the stipulated judgment, to keep its total conservation storage within the Article IV(b) limitation. New Mexico is required to notify Texas prior to a release and Texas may allow New Mexico to retain water in excess of the Article IV(b) limitation subject to the call of Texas and Article V of the Compact.

Paragraph 9

Paragraph 9 requires New Mexico to conduct sediment surveys at Ute Reservoir every ten years unless circumstances dictate the lack of need for such surveys and the Commission waives that requirement. In the periods between sediment surveys, estimates of annual increments of sedimentation based on the most recent sediment survey will be used to determine the amount of conservation storage in the reservoir.

Paragraph 10

Paragraph 10 permits the Commission to waive any of New Mexico's obligations under the decree. This authority is premised on the fact that because an interstate compact is also a contract, as the Court has emphasized, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), there would appear to be no reason why obligations under the Compact, as implemented by the decree, could not be waived in accordance with general contract law. A principal difference, of course, is the Constitutional requirement for Congressional

approval of compacts affecting national interests. *Virginia v. Tennessee*, 148 U.S. 503, 517-21 (1893); Frankfurter and Landis, *The Compact Clause - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1925). Consequently, where Congressional consent legislation contains special conditions to protect federal interests, the compact parties should not be permitted to waive such obligations. The Canadian River Compact consent legislation contains no such conditions. The Special Master has also determined that there are no federal interests requiring special protection in the decree. In this regard it is considered significant that the United States chose not to intervene in these proceedings. 1990 Rep. at 2. Nevertheless, Paragraph 10 would require the states to file with the Court a notice of any action they propose to take which would waive or modify any of New Mexico's decree obligations. This will permit the Court to take such action as it may deem appropriate if it disapproves of the proposed action.

Paragraph 10 also recognizes the Commission's authority to take any action "necessary and proper" to carry out Compact purposes so long as it is not in violation of or inconsistent with any provisions of the Compact. Since the Commission is a Congressionally approved interstate administrative agency, it seems appropriate to make it clear that it may exercise the same kinds of ancillary powers as a federal administrative agency. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). This clarification should give the Commission (and perhaps other compact commissions) an incentive to deal more creatively with important problems that might otherwise not be addressed at

all because of uncertainty about its authority or presented to the Court.

Paragraph 11

Paragraph 11 makes it clear that the decree does not purport to affect Compact rights or obligations except by providing, to the extent addressed by the decree, how such rights or obligations may be excised or enforced.

Paragraph 12

Paragraph 12 retains continuing jurisdiction in the Court over this suit for appropriate future relief. It also includes a requirement that the parties attempt to resolve any future disputes through good faith negotiations before they seek to invoke the Court's retained jurisdiction. The Court's 1991 decision rejected a similar proposal by the Special Master with respect to the initial exercise of its original jurisdiction in future interstate water compact disputes. 1990 Rep. at 26-34; 111 S. Ct. at 2286 note 3 and 2293 note 11. Texas and Oklahoma had objected to that original proposal. However, once the Court has resolved a dispute, as here, it seems particularly appropriate to impose such a requirement on subsequent invocation by the parties of the Court's retained jurisdiction. Such a requirement should encourage continued cooperative efforts at problem solving consistent with the Compact's purposes and discourage premature piecemeal litigation before the Court. In that spirit, all three states do not oppose this requirement.

The Special Master *finds* that the proposed decree will provide the states a workable framework for carrying out their Compact responsibilities in an effective, cooperative manner consistent with the spirit and letter of the Compact and the Court's earlier decision in these proceedings and *recommends* that it be entered.

Respectfully submitted,

JEROME C. MUYS
Special Master

Epilogue

> "When [the West] fully learns that cooperation, not rugged individualism, is the pattern that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery."
>
> Wallace Stegner, *The Sound of Mountain Water*

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 109, ORIGINAL

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

JOINT MOTION FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

Oklahoma, Texas, and New Mexico have signed a Stipulation on Entry of Final Judgment, Attachment A, and have approved the form and content of a Decree, Attachment B. If the Supreme Court enters the Judgment and Decree, the claims of Oklahoma and Texas based on New Mexico's violation of the Canadian River Compact from 1987 to date will be fully compromised and settled by the states. The Special Master recommends in his report to the Supreme Court that the Stipulated Judgment and Decree be entered by the Court. The states, therefore, respectfully request the Supreme Court to enter the proposed Stipulated Judgment and Decree in this case.

SUSAN B. LOVING
Attorney General of Oklahoma

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DAN MORALES
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TOM UDALL
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By: /s/ Peter Thomas White
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Counsel of Record for New Mexico

I recommend that this motion
be granted:

/s/ Jerome C. Muys
JEROME C. MUYS
Special Master

ATTACHMENT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 109, ORIGINAL

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

STIPULATION ON ENTRY OF FINAL JUDGMENT

Plaintiffs Oklahon.a and Texas and defendant New Mexico stipulate to the entry of the following judgment.

STIPULATED JUDGMENT

Based upon the joint motion of counsel for the parties in this case and the recommendation of the Special Master, it is ordered that the joint motion be, and it is hereby, granted and the Court enters judgment as follows:

1. New Mexico has been in violation of Article IV(b) of the Canadian River Compact from 1987 to date.

2. Pursuant to Paragraph 8 of the Decree entered in this case, New Mexico shall release from Ute Reservoir in 1993 sufficient water to result in an aggre-

gate of not more than 200,000 acre-feet of conservation storage below Conchas Dam in New Mexico, including conservation storage in the other reservoirs subject to the limitation under Article IV(b) of the Canadian River Compact. The release of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

3. Also in 1993, New Mexico shall release from Ute Reservoir an additional 25,000 acre-feet of storage below the Article IV(b) limitation. New Mexico shall operate Ute Reservoir through the year 2002 at or below the elevations set forth in the schedule below and in accordance with the provisions of Paragraph 8 of the Decree entered in this case. The schedule includes annual adjustments for sediment accumulation in Ute Reservoir and assumes the other reservoirs subject to the Article IV(b) limitation maintain storage at their total capacity of 6,760 acre-feet. The schedule shall be adjusted by the parties to reflect additional amounts of water in conservation storage in any reservoir enlarged or constructed after 1992. Releases of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

Ute Reservoir Operating Schedule

Year		Authorized Elevation	Reduced Storage Amount	Corresponding Reduced Elevation
After release in	1993	3781.58	25,000	3777.86
	1994	3781.66	25,000	3777.95
	1995	3781.74	25,000	3778.04
	1996	3781.83	25,000	3778.14
	1997	3781.91	25,000	3778.23
	1998	3781.99	20,000	3779.08
	1999	3782.08	15,000	3779.91
	2000	3782.16	6,250	3781.28
	2001	3782.24	3,125	3781.80
Refilled in	2002	3782.32	-0-	3782.32

4. Within seventy-five (75) days after entry of judgment, but in no event earlier than September 1, 1993, New Mexico shall pay as attorneys' fees $200,000 to Texas and $200,000 to Oklahoma. The parties agree that such payments do not constitute and shall not be considered as an admission, express or implicit, that New Mexico has any liability to Texas or Oklahoma for attorneys' fees.

5. Oklahoma and Texas shall release New Mexico from all claims for equitable or legal relief, other than the relief embodied in the Decree of the parties, arising out of New Mexico's violation of the Canadian River Compact during the years 1987 through the date this Stipulated Judgment is entered.

6. In the event of a conflict between this Judgment and the Decree entered in this case, the provisions of the Judgment shall control.

7. The costs of this case shall be equally divided among the parties.

/s/ Dean A. Couch
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Counsel of Record for New Mexico

Recommended for Entry:

/s/ Jerome C. Muys
Jerome C. Muys
Special Master

ATTACHMENT B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 109, ORIGINAL

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

DECREE

1. Under Article IV(a) of the Canadian River Compact ("Compact"), New Mexico is permitted free and unrestricted use of the waters of the Canadian River and its tributaries in New Mexico above Conchas Dam, such use to be made above or at Conchas Dam, including diversions for use on the Tucumcari Project and the Bell Ranch and the on-project storage of return flow or operational waste from those two projects so long as the recaptured water does not include the mainstream or tributary flows of the Canadian River; provided that transfers of water rights from above Conchas Dam to locations below Conchas Dam shall be subject to the conservation storage limitation of Compact Article IV(b). Nothing in this paragraph shall be deemed to determine whether or not the place of use of water rights may be transferred to locations outside the Canadian River basin in New Mexico.

2. Under Compact Article IV(b), New Mexico is limited to storage of no more than 200,000 acre-feet of the waters of the Canadian River and its tributaries, regardless of point of origin, at any time in reservoirs in the Canadian River basin in New Mexico below Conchas Dam for any beneficial use, exclusive of water stored for the exempt purposes specified in Compact Article II(d) and on-project storage of irrigation return flows or operational waste on the Tucumcari Project and Bell Ranch as provided for in Paragraph 1 of this Decree.

3. Quantities of water stored primarily for flood protection, power generation or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife or other beneficial uses not expressly mentioned in the Compact. In situations where storage may be for multiple purposes, including both conservation storage and exempt storage, nothing in this Decree shall preclude the Canadian River Commission ("Commission") from exempting an appropriate portion of such storage from chargeability as conservation storage.

4. Water stored at elevations below a dam's lowest permanent outlet works is not chargeable as conservation storage under the Compact unless the primary use of that storage is for a non-exempt purpose, or unless other means, such as pumps, are utilized to discharge such storage volumes from the reservoir. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without prior approval of the Commission, which shall not be unreasonably withheld. Water stored for non-exempt purposes behind a dam with capacity in excess of 100 acre-feet and with no outlet works is chargeable as conservation storage.

5. Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes must receive prior Commission approval to be exempt from chargeability as conservation storage, which approval shall not be unreasonably withheld.

6. All water stored in Ute Reservoir above elevation 3725 feet is conservation storage; provided that at such time as the authorization and funding of the Eastern New Mexico Water Supply Project or other project results in changed circumstances at Ute Reservoir, New Mexico may seek exemption of a reasonable portion of such water from the Commission under Paragraph 5 of this Decree and, if an exemption is denied, may petition the Court for appropriate relief under Paragraph 12 of this Decree.

7. In 1988 there were 63 small reservoirs in New Mexico with capacities of 100 acre-feet or less with a total capacity of about 1,000 acre-feet, which the Commission has treated as de minimis by waiving storage volume reporting obligations. Water stored in these reservoirs or in similarly sized reservoirs in the future is not chargeable as conservation storage, unless otherwise determined by the Commission.

8. Based on the elevation-capacity relationship of Ute Reservoir effective January 1, 1993, and adjustments pursuant to Paragraph 9 of this Decree, New Mexico shall make and maintain appropriate releases of water from Ute Reservoir or other conservation

storage facilities in excess of 100 acre-feet of capacity at the maximum rate consistent with safe operation of such reservoirs so that total conservation storage in the Canadian River basin below Conchas Dam in New Mexico is limited to no more than 200,000 acre-feet at any time; provided that operation of Ute Reservoir for the period 1993-2002 shall be pursuant to the schedule contained in the Judgment entered in this case; and provided that no violation of this paragraph will occur during any period in which the outlet works of Ute Reservoir are discharging water at the maximum safe discharge capacity (currently 350 cubic feet per second) following the first knowledge that the 1993-2002 schedule or the Article IV(b) limitation after 2002 probably would be exceeded; and provided further that Texas shall be notified by New Mexico prior to a release and may allow New Mexico to retain water in conservation storage in excess of the 1993-2002 schedule or the Article IV(b) limitation after 2002, subject to the call of Texas and subject to the provisions of Article V of the Compact. The outlet works of Ute Reservoir shall be maintained in good working order and shall not be modified to reduce the safe discharge capacity without prior approval of the Commission, which shall not be unreasonably withheld.

9. Sediment surveys of Ute Reservoir shall be conducted at least every ten years by New Mexico, unless such requirement is waived by the Commission. Conservation storage in Ute Reservoir shall be determined from the most recent sediment survey and an annual estimate of the total additional sediment deposition in the reservoir using an annual average of

sediment accumulation during the period between 1963 and the most recently completed survey.

10. Any of the obligations imposed on New Mexico by this Decree may be waived or modified by the Commission; provided that the parties hereto shall file notice of any such action with the Court. The Commission is also authorized to take any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes.

11. Nothing in this Decree is intended to affect a state's rights or obligations under the Compact, except as specifically addressed herein.

12. The Court retains jurisdiction of this suit for the purposes of any order, direction, or modification of this Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy; provided, that any party requesting the Court to exercise its jurisdiction under this paragraph or answering such request shall certify that it has attempted to negotiate in good faith with the other parties in an effort to resolve the dispute sought to be brought before the Court.

Approved as to form and content:

/s/ Dean A. Couch

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Recommended for Entry:

/s/ Jerome C. Muys

JEROME C. MUYS
Special Master

(19)

No. 109, Original

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FILED
MAY 28 1993
OFFICE OF THE CLERK

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JOINT MOTION FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

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9 pp

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2. Pursuant to Paragraph 8 of the Decree entered in this case, New Mexico shall release from Ute Reservoir in 1993 sufficient water to result in an aggre-

gate of not more than 200,000 acre-feet of conservation storage below Conchas Dam in New Mexico, including conservation storage in the other reservoirs subject to the limitation under Article IV(b) of the Canadian River Compact. The release of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

3. Also in 1993, New Mexico shall release from Ute Reservoir an additional 25,000 acre-feet of storage below the Article IV(b) limitation. New Mexico shall operate Ute Reservoir through the year 2002 at or below the elevations set forth in the schedule below and in accordance with the provisions of Paragraph 8 of the Decree entered in this case. The schedule includes annual adjustments for sediment accumulation in Ute Reservoir and assumes the other reservoirs subject to the Article IV(b) limitation maintain storage at their total capacity of 6,760 acre-feet. The schedule shall be adjusted by the parties to reflect additional amounts of water in conservation storage in any reservoir enlarged or constructed after 1992. Releases of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

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5. Oklahoma and Texas shall release New Mexico from all claims for equitable or legal relief, other than the relief embodied in the Decree of the parties, arising out of New Mexico's violation of the Canadian River Compact during the years 1987 through the date this Stipulated Judgment is entered.

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Counsel of Record for New Mexico

Recommended for Entry:

/s/ Jerome C. Muys
Jerome C. Muys
Special Master

ATTACHMENT B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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DECREE

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2. Under Compact Article IV(b), New Mexico is limited to storage of no more than 200,000 acre-feet of the waters of the Canadian River and its tributaries, regardless of point of origin, at any time in reservoirs in the Canadian River basin in New Mexico below Conchas Dam for any beneficial use, exclusive of water stored for the exempt purposes specified in Compact Article II(d) and on-project storage of irrigation return flows or operational waste on the Tucumcari Project and Bell Ranch as provided for in Paragraph 1 of this Decree.

3. Quantities of water stored primarily for flood protection, power generation or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife or other beneficial uses not expressly mentioned in the Compact. In situations where storage may be for multiple purposes, including both conservation storage and exempt storage, nothing in this Decree shall preclude the Canadian River Commission ("Commission") from exempting an appropriate portion of such storage from chargeability as conservation storage.

4. Water stored at elevations below a dam's lowest permanent outlet works is not chargeable as conservation storage under the Compact unless the primary use of that storage is for a non-exempt purpose, or unless other means, such as pumps, are utilized to discharge such storage volumes from the reservoir. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without prior approval of the Commission, which shall not be unreasonably withheld. Water stored for non-exempt purposes behind a dam with capacity in excess of 100 acre-feet and with no outlet works is chargeable as conservation storage.

5. Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes must receive prior Commission approval to be exempt from chargeability as conservation storage, which approval shall not be unreasonably withheld.

6. All water stored in Ute Reservoir above elevation 3725 feet is conservation storage; provided that at such time as the authorization and funding of the Eastern New Mexico Water Supply Project or other project results in changed circumstances at Ute Reservoir, New Mexico may seek exemption of a reasonable portion of such water from the Commission under Paragraph 5 of this Decree and, if an exemption is denied, may petition the Court for appropriate relief under Paragraph 12 of this Decree.

7. In 1988 there were 63 small reservoirs in New Mexico with capacities of 100 acre-feet or less with a total capacity of about 1,000 acre-feet, which the Commission has treated as de minimis by waiving storage volume reporting obligations. Water stored in these reservoirs or in similarly sized reservoirs in the future is not chargeable as conservation storage, unless otherwise determined by the Commission.

8. Based on the elevation-capacity relationship of Ute Reservoir effective January 1, 1993, and adjustments pursuant to Paragraph 9 of this Decree, New Mexico shall make and maintain appropriate releases of water from Ute Reservoir or other conservation

storage facilities in excess of 100 acre-feet of capacity at the maximum rate consistent with safe operation of such reservoirs so that total conservation storage in the Canadian River basin below Conchas Dam in New Mexico is limited to no more than 200,000 acre-feet at any time; provided that operation of Ute Reservoir for the period 1993-2002 shall be pursuant to the schedule contained in the Judgment entered in this case; and provided that no violation of this paragraph will occur during any period in which the outlet works of Ute Reservoir are discharging water at the maximum safe discharge capacity (currently 350 cubic feet per second) following the first knowledge that the 1993-2002 schedule or the Article IV(b) limitation after 2002 probably would be exceeded; and provided further that Texas shall be notified by New Mexico prior to a release and may allow New Mexico to retain water in conservation storage in excess of the 1993-2002 schedule or the Article IV(b) limitation after 2002, subject to the call of Texas and subject to the provisions of Article V of the Compact. The outlet works of Ute Reservoir shall be maintained in good working order and shall not be modified to reduce the safe discharge capacity without prior approval of the Commission, which shall not be unreasonably withheld.

9. Sediment surveys of Ute Reservoir shall be conducted at least every ten years by New Mexico, unless such requirement is waived by the Commission. Conservation storage in Ute Reservoir shall be determined from the most recent sediment survey and an annual estimate of the total additional sediment deposition in the reservoir using an annual average of

sediment accumulation during the period between 1963 and the most recently completed survey.

10. Any of the obligations imposed on New Mexico by this Decree may be waived or modified by the Commission; provided that the parties hereto shall file notice of any such action with the Court. The Commission is also authorized to take any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes.

11. Nothing in this Decree is intended to affect a state's rights or obligations under the Compact, except as specifically addressed herein.

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Approved as to form and content:

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Recommended for Entry:

/s/ Jerome C. Muys

JEROME C. MUYS
Special Master

Supreme Court, U.S.
FILED
NOV 19 1993
CLERK

No. 109, Original

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATES OF OKLAHOMA AND TEXAS, PLAINTIFFS

v.

STATE OF NEW MEXICO, DEFENDANT

ON JOINT MOTION OF THE PARTIES FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 109, Original

STATES OF OKLAHOMA AND TEXAS, PLAINTIFFS

v.

STATE OF NEW MEXICO, DEFENDANT

ON JOINT MOTION OF THE PARTIES FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The States of Oklahoma and Texas brought this original action against the State of New Mexico to resolve a dispute under the Canadian River Compact, Act of May 17, 1952, ch. 306, § 1, 66 Stat. 74. This Court granted Oklahoma and Texas leave to file their complaint, *Oklahoma* v. *New Mexico*, 484 U.S. 808 (1987), and referred the matter to a Special Master, 484 U.S. 1023 (1988). On October 15, 1990, the Special Master submitted his report. See 498 U.S. 956 (1990). The Court considered the exceptions filed by the

three States, sustained them in part and overruled them in part, and remanded the case for further proceedings. 111 S. Ct. 2281 (1991). On May 28, 1993, the Special Master submitted a report on the remanded issues, and shortly thereafter, Oklahoma, Texas, and New Mexico filed a joint motion for entry of a stipulated judgment and decree. On June 28, 1993, this Court invited the Solicitor General to file a brief expressing the views of the United States. 113 S. Ct. 3031 (1993).

1. The Canadian River rises in New Mexico near the Colorado-New Mexico border and flows south and then east across New Mexico, through the Texas panhandle, and across Oklahoma until it eventually joins the Arkansas River. The United States and the States have constructed three significant water storage projects on the River: (a) Conchas Dam in New Mexico, about 30 miles northwest of Tucumcari, which provides water to the Bureau of Reclamation's Tucumcari Project; (b) Ute Dam and Reservoir in New Mexico, about 45 miles downstream from Conchas Dam; and (c) Sanford Dam in Texas, about 165 river miles downstream from Ute Reservoir. See *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2283-2286; Special Master's Report 1a-2a (Oct. 15, 1990) (reproducing maps).

The Canadian River Compact, ratified by Oklahoma, Texas, and New Mexico in 1951 and approved by Congress in 1952, 66 Stat. 74, allocates the Canadian River's flow among the three States. The Compact apportions the Canadian River water primarily by imposing restrictions on the impoundment of water in New Mexico and Texas. The Compact also creates an interstate agency, the Canadian River Commission,

to administer the Compact. The Commission consists of a non-voting presiding officer designated by the President of the United States and three voting members designated by the respective States. See Special Master's Report 3a-9a (Oct. 15, 1990) (reproducing Compact).

Article IV of the Compact limits New Mexico's use of the Canadian River's waters as follows:

> (a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.
>
> (b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet.

66 Stat. 75. Article II(d) of the Compact defines "conservation storage" as

> that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

66 Stat. 75.

2. Beginning in 1982, New Mexico took steps to enlarge Ute Reservoir from its original capacity of 109,600 acre-feet to a capacity of 272,800 acre-feet. In

addition, New Mexico designated 49,900 acre-feet of storage immediately above the reservoir outlet works as a "desilting pool," and it treated the desilting pool as exempt from the Compact's limit on conservation storage on the theory that the pool was allocated to "sediment control." 66 Stat. 75. Texas and Oklahoma objected to New Mexico's addition of physical reservoir capacity below Conchas Dam in excess of 200,000 acre-feet and to New Mexico's claimed exemption for the "desilting pool." Those objections provided the primary impetus for this original action. See Special Master's Report 16-22 (Oct. 15, 1990).

The Special Master examined the evidence, considered the legal arguments of the States, and prepared a report containing a recommended disposition of the matter. He concluded that Article IV(b) of the Canadian River Compact imposes a limit on the amount of water New Mexico may store, rather than a limit on the physical reservoir capacity. He also determined that waters originating in the Canadian River Basin above Conchas Dam, but reaching the mainstream of the river below the Conchas Dam as a result of dam spills and releases or Tucumcari Project seepage and return flows, are subject to Article IV(b)'s 200,000 acre-feet storage limitation. The Special Master concluded that the controversy over the "desilting pool" should be referred to the Canadian River Commission for possible resolution. He also concluded that if the Court agreed with his proposed disposition of the foregoing issues, then New Mexico should be found in violation of the Compact insofar as it did not count Conchas Dam spills and releases and Tucumcari Project seepage and return flows as part of the 200,000 acre-feet limitation, and the case should be

returned to the Special Master for a determination of appropriate relief. Special Master's Report 24-25 (Oct. 15, 1990); see *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2286.

This Court considered the States' various exceptions to the Special Master's recommended disposition and largely rejected them. *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2286-2293. The Court agreed with the Special Master's conclusion that Article IV(b) limits water storage rather than reservoir capacity, 111 S. Ct. at 2286-2287, and that the 200,000 acre-feet storage limitation applies to Conchas Dam spills and releases and Tucumcari Project seepage and return flows, *id.* at 2287-2292. The Court disagreed, however, with the Special Master's recommendation that the "desilting pool" issue should be referred to the Canadian River Commission. The Court explained that it has " 'a serious responsibility to adjudicate cases where there are actual, existing controversies' between the States over the waters in interstate streams." *Id.* at 2292-2293 (quoting *Arizona* v. *California*, 373 U.S. 546, 564 (1963)). The Court saw "no legal basis for the Master refusing to decide the question," and it accordingly remanded the issue to the Master "for such further proceedings as may be necessary and a recommendation on the merits." 111 S. Ct. at 2293.

3. On remand, the Special Master took additional evidence, allowed further briefing, and prepared a draft report. The parties then negotiated a settlement of the dispute and prepared a stipulated judgment and decree, which the Special Master approved. On May 28, 1993, the Special Master submitted his Report on Remand, which recommends that this

Court grant the parties' simultaneously filed joint motion for entry of the stipulated judgment and decree.

DISCUSSION

The States of Oklahoma, Texas, and New Mexico request that this Court enter a stipulated judgment and decree concluding this original action. The United States submits that the States have reached an appropriate resolution of the matter insofar as the proposed judgment and decree clarify the legal obligations of the parties with respect to the issues in dispute in this litigation. However, the provisions of the proposed decree contained in paragraph 10, which additionally address the authority of the Canadian River Commission, should be eliminated.

1. When this Court exercises its original jurisdiction, it possesses powers analogous to those of a trial court, including the power to resolve disputed matters through the entry of a judgment or decree proposed by the parties. See *New Hampshire* v. *Maine*, 426 U.S. 363, 368 (1976). That power derives from a court's authority to adjudicate legal issues, and not merely from the parties' consent. See *System Federation No. 91, Railway Employees' Dep't* v. *Wright*, 364 U.S. 642, 651 (1961). Thus, the Court should reject a stipulated judgment or consent decree unless the requested order is "judicial" in the sense that it resolves the Article III case or controversy before the Court. Compare *New Hampshire* v. *Maine*, 426 U.S. at 368-369 (adopting a consent decree resolving a boundary dispute "consistent with our Art. III function and duty") with *Vermont* v. *New York*, 417 U.S. 270, 277 (1974) (per curiam) (rejecting a consent decree requiring the Court to undertake an

"arbitral" function). Furthermore, the Court should reject a stipulated judgment or consent decree that rests on a mistake of law or otherwise provides an inappropriate resolution of the case. The Court is not obligated to enter a judgment on an incorrect or improper basis "simply because the parties agree upon it." *United States* v. *Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment).

2. The proposed stipulated judgment poses no difficulties under the foregoing principles. In accordance with this Court's 1991 decision and the proceedings on remand, the judgment declares that New Mexico has been in violation of Article IV(b) of the Canadian River Compact since 1987. Proposed Stipulated Judgment ¶ 1. It also establishes reservoir storage levels and a schedule of water releases during the next ten years to bring New Mexico into compliance with the Compact and to compensate Oklahoma and Texas for the violation. *Id.* ¶¶ 2-3. Finally, the judgment provides that New Mexico shall pay attorneys' fees to Oklahoma and Texas in a specified amount, that Oklahoma and Texas shall release New Mexico from all other claims arising out of New Mexico's violation, that the provisions of the proposed judgment shall take precedence over the proposed decree, and that the costs in this case shall be equally divided among the parties. *Id.* ¶¶ 4-7. As the Special Master explains, the proposed judgment fairly and practicably implements this Court's decision. See Special Master's Report on Remand 7-8 (May 28, 1993). The United States has no objection to the entry of the proposed judgment.

3. The proposed decree is more problematic. The 12-paragraph decree provides an appropriate resolu-

tion of the issues in this litigation insofar as it clarifies how the Compact governs particular water storage activities. But the decree also includes novel provisions, contained in paragraph 10, that allow the Canadian River Commission to waive or modify "the obligations imposed on New Mexico by this Decree" and provide that the Commission may take "any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes."

a. Paragraphs 1 and 2 are clearly appropriate because they effectuate this Court's 1991 decision. Paragraph 1 implements the Court's interpretation of Article IV(a) of the Compact by allowing New Mexico free and unrestricted use of the Canadian River for uses above Conchas Dam, which include diversions for use on the Tucumcari Project and the Bell Ranch. See *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2287-2288, 2293 n.12. Paragraph 2 implements the Court's interpretation of Article IV(b) by limiting New Mexico to storage of not more than 200,000 acre-feet below Conchas Dam, subject to recognized exceptions. See 111 S. Ct. at 2291-2292; see generally Special Master's Report on Remand 8-9 (May 28, 1993).

Paragraphs 3 through 6 are also appropriate, because they resolve the "desilting pool" issue through terms that are consistent with the Compact. Paragraph 3 clarifies that the Canadian River Commission may classify water in a multiple purpose reservoir that is stored "primarily" for flood control, power generation, or sediment control as exempt from the conservation storage limitation. Paragraph 4 provides that water stored below a reservoir's outlet works is generally exempt from conservation storage, while paragraph 5 requires a State to seek Commission approval before redesignating storage volumes for flood control, power production, or sediment control. Paragraph 6 specifies that water stored in Ute Reservoir above elevation 3725 (*i.e.*, the so-called "desilting pool," see *Oklahoma* v. *New Mexico*, 111 S. Ct. at 2292 n.10) shall be treated as conservation storage, provided that New Mexico may seek redesignation in the future based on changed circumstances. See Special Master's Report on Remand 9-11.

Paragraphs 7 through 9 are appropriate because they resolve other disputed operational matters through terms that are consistent with the Compact. Paragraph 7 exempts certain small reservoirs from classification as conservation storage, while paragraph 8 directs New Mexico to release water from storage in accordance with the Compact, the stipulated judgment, and safe operational practices. Paragraph 9 directs New Mexico to conduct sediment surveys at Ute Reservoir every ten years to establish the reservoir's capacity for conservation storage. See Special Master's Report on Remand 11-12.

b. Paragraphs 10 through 12 contain general provisions concerning the relationship between the decree and the Compact. Paragraphs 11 and 12 are not controversial. Paragraph 11 expresses the parties' intent that "[n]othing in this Decree is intended to affect a state's rights or obligations under the Compact, except as specifically addressed herein." Although that provision on its face might be read to suggest that the decree has altered the States' rights or obligations under the Compact, the Special Master's Report on Remand explains (at 14) that

paragraph 11 simply makes clear that the decree, in certain respects, "provid[es] * * * how such rights or obligations may be exercised or enforced." As so understood, paragraph 11 is unobjectionable as a statement of the resolution of disputed issues arising under the Compact. Paragraph 12 additionally provides that the States may invoke this Court's jurisdiction for purposes of enforcing or modifying the decree, and includes a salutary agreement among the States that they shall attempt to resolve disputes through negotiations before invoking the Court's retained jurisdiction.

Paragraph 10, however, is novel. It provides:

> Any of the obligations imposed on New Mexico by this Decree may be waived or modified by the Commission; provided that the parties hereto shall file notice of any such action with the Court. The Commission is also authorized to take any necessary and proper actions, not in violation of any provisions of the Compact, to implement the Compact purposes.

Proposed Decree ¶ 10. We suggest that this provision is inappropriate and should be deleted.

The first sentence of paragraph 10 is inappropriate because it would vest the Canadian River Commission with the power to modify or waive obligations imposed by a decree of this Court. We are aware of no other instance in which the Court has delegated that judicial power to another entity. Rather, when this Court enters a decree, it reserves to itself the power to determine whether changed conditions or other circumstances warrant a modification or waiver of the obligations imposed therein. See, *e.g.*, *Texas* v. *New Mexico*, 482 U.S. 124, 133 (1987). No reason

exists to depart from that practice in this case. The Special Master recommended inclusion of this sentence on the theory that an interstate compact is also a contract and "there would appear to be no reason why obligations under the Compact, as implemented by the decree, could not be waived in accordance with general contract law." Special Master's Report on Remand 12. The decree, however, operates as a judicial injunction. If the parties seek to have their rights determined by judicial decree, then they must also abide by the rules governing injunctions, including the longstanding rule that the court issuing an injunction is entitled to determine in the first instance whether to waive or modify the specified obligations. See, *e.g.*, *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922).[1]

The second sentence of paragraph 10 is also inappropriate, because it is either surplusage or it gives the Commission powers beyond those granted by Congress in approving the Canadian River Compact. On the one hand, if that sentence is intended merely to acknowledge the Commission's existing powers under the Compact, then the sentence is unnecessary. On the other hand, if the sentence is intended to expand the Commission's powers beyond what the Compact provides, then the source of that authority is open to question. In either instance, the

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[1] Moreover, because the Compact has been approved by Congress, and in light of the constitutional requirement of the consent of Congress for any "Agreement or Compact" between one State and another (Art. I, § 10, Cl. 3), the States presumably could not alter the terms of the Compact itself without congressional approval. See *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983).

second sentence of paragraph 10 serves no proper and useful purpose. The Special Master recommended inclusion of this sentence on the theory that the Commission "may exercise the same kinds of ancillary powers as a federal administrative agency" and that "[t]his clarification should give the Commission (and perhaps other compact commissions) an incentive to deal more creatively with important problems that might otherwise not be addressed at all." Special Master's Report on Remand 13-14. A decree, however, should be formulated to resolve the case or controversy before the court, and not to create incentives for unrelated governmental action.[2]

[2] Unlike some other compacts, the Canadian River Compact does not expressly provide for the Commission to make findings and determinations on a broad range of matters that may arise in the administration of the Compact and water flows in the River. Aside from the record-keeping and reporting responsibilities specified in Article IX(c) and (d), 66 Stat. 77, the only other power expressly conferred on the Commission is to permit New Mexico and Texas, on a year-to-year basis, to impound more water than the amounts set forth in Articles IV and V. See Art. VII, 66 Stat. 76. Compare, *e.g.*, Pecos River Compact, Art. V, 63 Stat. 162-163 (see *Texas* v. *New Mexico*, 462 U.S. at 560, 565-567); Upper Colorado River Basin Compact, Art. VIII, 63 Stat. 35-37; Arkansas River Compact, Art. VIII(A) and (B), 63 Stat. 149-150.

We note that several paragraphs of the decree nevertheless contemplate a role for the Commission in matters arising under the Compact and decree. Most have to do with applying in various circumstances the Compact's basic distinction between storage chargeable to conservation and exempt storage. See ¶¶ 3-6; see also ¶ 7 (providing, consistent with Commission's past practice of waiving reporting requirements, that New Mexico dams with capacity of less than 100 acre-feet are not chargeable to conservation storage "unless otherwise determined by the

We have explained our reservations concerning paragraph 10 to counsel for New Mexico, Oklahoma, and Texas, and they have authorized us to state that they do not object to deletion of that paragraph.

Commission"), ¶ 8 (outlet works at Ute Reservoir not to be changed without Commission approval). Although the Compact does not expressly provide for the Commission to perform those functions, we are unaware of any indication that either the States that entered into the Compact or the Congress that consented to it intended to foreclose the Commission from doing so, at least where, as here, the Commission will act pursuant to an order of this Court entered on the motion of the States themselves. In fact, the Senate Report on the bill by which Congress gave its consent to the Compact states that the Commission would be "empowered to administer the compact," in addition to collecting water-flow data and making reports. S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1952). Moreover, the Commission may act only upon the unanimous vote of the Commissioners representing the three States. For these reasons, and because the Commission's role under the cited paragraphs of the decree is essentially to make subsidiary determinations in implementing the now-settled terms of the Compact and decree, we do not find the Commission's role under those paragraphs to be objectionable.

CONCLUSION

The Court should enter the proposed stipulated judgment and enter all of the proposed decree except paragraph 10.

Respectfully submitted.

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NOVEMBER 1993

SUPREME COURT OF THE UNITED STATES

STATE OF OKLAHOMA AND STATE OF TEXAS *v.* NEW MEXICO

ON JOINT MOTION FOR ENTRY OF STIPULATED JUDGMENT AND DECREE

No. 109, Original. Decided December 13, 1993

The joint motion for entry of stipulated judgment and decree, as modified, is granted.

STIPULATED JUDGMENT, AS MODIFIED

1. New Mexico has been in violation of Article IV(b) of the Canadian River Compact from 1987 to date.

2. Pursuant to Paragraph 8 of the Decree entered in this case, New Mexico shall release from Ute Reservoir in 1993 sufficient water to result in an aggregate of not more than 200,000 acre-feet of conservation storage below Conchas Dam in New Mexico, including conservation storage in the other reservoirs subject to the limitation under Article IV(b) of the Canadian River Compact. The release of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

3. New Mexico shall also release from Ute Reservoir an additional 25,000 acre-feet of storage below the Article IV(b) limitation. New Mexico shall operate Ute Reservoir through the year 2002 at or below the elevations set forth in the schedule below and in accordance with the provisions of Paragraph 8 of the Decree entered in this case. The schedule includes annual adjustments for sediment accumulation in Ute Reservoir and assumes the other reservoirs subject to the Article IV(b) limitation maintain storage at their total capacity of 6,760 acre-feet. The schedule shall be adjusted by the parties

to reflect additional amounts of water in conservation storage in any reservoir enlarged or constructed after 1992. Releases of water from Ute Reservoir will be coordinated with Oklahoma and Texas and will be at the call of Texas.

Ute Reservoir Operating Schedule

Year		Authorized Elevation	Reduced Storage Amount	Corresponding Reduced Elevation
After release in	1993	3781.58	25,000	3777.86
	1994	3781.66	25,000	3777.95
	1995	3781.74	25,000	3778.04
	1996	3781.83	25,000	3778.14
	1997	3781.91	25,000	3778.23
	1998	3781.99	20,000	3779.08
	1999	3782.08	15,000	3779.91
	2000	3782.16	6,250	3781.28
	2001	3782.24	3,125	3781.80
Refilled in	2002	3782.32	-0-	3782.32

4. Within seventy-five (75) days after entry of judgment New Mexico shall pay as attorneys' fees $200,000 to Texas and $200,000 to Oklahoma. The parties agree that such payments do not constitute and shall not be considered as an admission, express or implicit, that New Mexico has any liability to Texas or Oklahoma for attorneys' fees.

5. Oklahoma and Texas shall release New Mexico from all claims for equitable or legal relief, other than the relief embodied in the Decree of the parties, arising out of New Mexico's violation of the Canadian River Compact during the years 1987 through the date this Stipulated Judgment is entered.

6. In the event of a conflict between this Judgment and the Decree entered in this case, the provisions of the Judgment shall control.

7. The costs of this case shall be equally divided among the parties.

DECREE, AS MODIFIED

1. Under Article IV(a) of the Canadian River Compact ("Compact"), New Mexico is permitted free and unrestricted use of the waters of the Canadian River and its tributaries in New Mexico above Conchas Dam, such use to be made above or at Conchas Dam, including diversions for use on the Tucumcari Project and the Bell Ranch and the on-project storage of return flow or operational waste from those two projects so long as the recaptured water does not include the mainstream or tributary flows of the Canadian River; provided that transfers of water rights from above Conchas Dam to locations below Conchas Dam shall be subject to the conservation storage limitation of Compact Article IV(b). Nothing in this paragraph shall be deemed to determine whether or not the place of use of water rights may be transferred to locations outside the Canadian River basin in New Mexico.

2. Under Compact Article IV(b), New Mexico is limited to storage of no more than 200,000 acre-feet of the waters of the Canadian River and its tributaries, regardless of point of origin, at any time in reservoirs in the Canadian River basin in New Mexico below Conchas Dam for any beneficial use, exclusive of water stored for the exempt purposes specified in Compact Article II(d) and on-project storage of irrigation return flows or operational waste on the Tucumcari Project and Bell Ranch as provided for in Paragraph 1 of this Decree.

3. Quantities of water stored primarily for flood protection, power generation or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife or other beneficial uses not expressly mentioned in the Compact. In situations where storage may be for multiple purposes, including

both conservation storage and exempt storage, nothing in this Decree shall preclude the Canadian River Commission ("Commission") from exempting an appropriate portion of such storage from chargeability as conservation storage.

4. Water stored at elevations below a dam's lowest permanent outlet works is not chargeable as conservation storage under the Compact unless the primary use of that storage is for a non-exempt purpose, or unless other means, such as pumps, are utilized to discharge such storage volumes from the reservoir. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without prior approval of the Commission, which shall not be unreasonably withheld. Water stored for non-exempt purposes behind a dam with capacity in excess of 100 acre-feet and with no outlet works is chargeable as conservation storage.

5. Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes must receive prior Commission approval to be exempt from chargeability as conservation storage, which approval shall not be unreasonably withheld.

6. All water stored in Ute Reservoir above elevation 3725 feet is conservation storage; provided that at such time as the authorization and funding of the Eastern New Mexico Water Supply Project or other project results in changed circumstances at Ute Reservoir, New Mexico may seek exemption of a reasonable portion of such water from the Commission under Paragraph 5 of this Decree and, if an exemption is denied, may petition the Court for appropriate relief under Paragraph 11 of this Decree.

7. In 1988 there were 63 small reservoirs in New Mexico with capacities of 100 acre-feet or less with a total capacity of about 1,000 acre-feet, which the Commission has treated as de minimis by waiving storage volume reporting obligations. Water stored in these

reservoirs or in similarly sized reservoirs in the future is not chargeable as conservation storage, unless otherwise determined by the Commission.

8. Based on the elevation-capacity relationship of Ute Reservoir effective January 1, 1993, and adjustments pursuant to Paragraph 9 of this Decree, New Mexico shall make and maintain appropriate releases of water from Ute Reservoir or other conservation storage facilities in excess of 100 acre-feet of capacity at the maximum rate consistent with safe operation of such reservoirs so that total conservation storage in the Canadian River basin below Conchas Dam in New Mexico is limited to no more than 200,000 acre-feet at any time; provided that operation of Ute Reservoir for the period 1993–2002 shall be pursuant to the schedule contained in the Judgment entered in this case; and provided that no violation of this paragraph will occur during any period in which the outlet works of Ute Reservoir are discharging water at the maximum safe discharge capacity (currently 350 cubic feet per second) following the first knowledge that the 1993–2002 schedule or the Article IV(b) limitation after 2002 probably would be exceeded; and provided further that Texas shall be notified by New Mexico prior to a release and may allow New Mexico to retain water in conservation storage in excess of the 1993–2002 schedule or the Article IV(b) limitation after 2002, subject to the call of Texas and subject to the provisions of Article V of the Compact. The outlet works of Ute Reservoir shall be maintained in good working order and shall not be modified to reduce the safe discharge capacity without prior approval of the Commission, which shall not be unreasonably withheld.

9. Sediment surveys of Ute Reservoir shall be conducted at least every ten years by New Mexico, unless such requirement is waived by the Commission. Conservation storage in Ute Reservoir shall be determined from the most recent sediment survey and an annual estimate of the total additional sediment deposition in the reservoir using an annual average of sediment ac-

cumulation during the period between 1963 and the most recently completed survey.

10. Nothing in this Decree is intended to affect a state's rights or obligations under the Compact, except as specifically addressed herein.

11. The Court retains jurisdiction of this suit for the purposes of any order, direction, or modification of this Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy; provided, that any party requesting the Court to exercise its jurisdiction under this paragraph or answering such request shall certify that it has attempted to negotiate in good faith with the other parties in an effort to resolve the dispute sought to be brought before the Court.